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STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF BEE, E. H. LUIKART, RECEIVER, APPELLEE: JOHN LUSHER, INTERVENER, APPELLANT.

FILED MARCH 1, 1935. No. 29164.

1. **Jury.** In a state bank receivership, when the issue is whether a deposit is a preferred claim, the claimant is not entitled to a jury trial.
2. **Affirmance.** Facts examined, and *held* that the judgment of the district court is sustained by the evidence, and it is affirmed.

APPEAL from the district court for Seward county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

McKillip & Barth, for appellant.

F. C. Radke, Barlow Nye and *Thomas, Vail & Jones, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

GOSS, C. J.

This is an appeal by the estate of John Lusher from the classification of a deposit in the receivership of the State Bank of Bee, Seward county.

The bank was adjudicated insolvent on June 4, 1931, and E. H. Luikart was appointed receiver. When the bank closed John Lusher held its certificate of deposit for $15,500, dated February 28, 1931, regular on its face and calling for 4 per cent. annual interest. From other facts the receiver concluded that the actual deposit and previous ones out of which it had grown evidenced payment by the bank and acceptance by Lusher of interest on his deposits at the rate of 5 per cent. Since April 1, 1926, it has been illegal to pay or receive, directly or indirectly, more than 4 per cent. on deposits and such an illegal deposit is not entitled to priority of payment from the assets of the bank. Comp. St. 1929, sec. 8-140; Comp. St. Supp. 1933, sec. 8-140. The receiver reported, classifying this claim as

invalid. The district court provided for pleadings and a hearing on this and other claims of like nature. Pleadings were filed by claimant and the receiver, a trial of the issues was had before the court on May 26, 1933, and on December 30, 1933, when the testimony was closed by the evidence of one witness produced by the intervener. Mr. Lusher had testified at the trial, but died in September, 1933, and the cause was revived in the name of his administrator. The district court found that the claim was not entitled to priority nor to the benefit of the depositors' final settlement fund, but should be allowed as a general claim against the bank and decreed accordingly.

Appellant assigns and argues errors which may be summarized as follows: (1) The court erred in not transferring the cause to the law docket; and (2) the judgment is not sustained by the evidence.

It cannot be disputed that the receivership case in which the cause is bedded is entirely equitable in its nature. The funds held by the receiver constitute a trust to be administered for the benefit of classes to which, under the statute, the law allocates interests in those funds. The claimant here alleges facts showing he belongs in the certain preferred class of depositors having priority. The receiver pleads facts indicating that the claim is only a general claim. On the issues thus made, the inquiry is not only as to the amount of the claim, of which strict proof has been required, but is as to whether the facts justly entitle the claim to participate in a fund held for equitable distribution to preferred claims or whether it is subject to such preferred claims. The amount of the claim is really only incidental. The quality of the claim, which is the chief inquiry, and the character of the fund out of which it is to be paid are determinable by equitable cognizance. It has always been considered in this jurisdiction that causes like that before us are to be heard and decided by a court sitting in equity and not by a jury.

Appellant cites several Nebraska cases to sustain his proposition that intervener was entitled to a jury trial.

In that part of his brief devoted to the argument he uses only one, *Gering v. Buerstetta,* 118 Neb. 54. That was a case in which Gering, county treasurer of Cass county, and others were awarded certain preferences in a proceeding in equity against the receiver of First National Bank of Plattsmouth and George E. Dovey, former cashier thereof. In effect, the suit was to trace and impound certain trust funds in the hands of other banks at the time the particular bank was placed in the hands of the receiver or when it was insolvent. The petition alleged, and the evidence seems to show, that on December 2, 1926, Gering, as county treasurer, had been induced by Dovey to make a deposit of a somewhat larger sum, but among the checks was one of the Missouri Pacific Railroad Company for $24,663.68 for taxes which formed, as the opinion states, the sole basis of the action. The opinion held that the check and its proceeds, when collected, constituted trust funds. The charge against Dovey was that, in soliciting the deposit from the treasurer, his attention being called to the fact that the bond to secure deposits by the county in the bank was already equalled by county deposits, he stated to the treasurer, at her office where he solicited the deposit, that the bank had already obtained a bond which was at the bank, and, if he had known he was coming down, he would have brought it. He also stated the bank was in sound financial condition. She believed his statements and let him have the deposit of the check. The pleadings contained prayers for a money judgment only against Dovey. The opinion holds that the facts recited entitled the appellees to an action against Dovey at common law for deceit and that he should have been given a jury trial as he had requested.

The other cases cited by appellant on the subject of a jury trial, but not argued, are less complicated, are easily distinguishable from the case at bar, and are not applicable, but lack of space forbids their analysis. Intervener Lusher was not entitled to a jury trial and the court did not err in refusing to transfer the cause to a law calendar.

The remaining question is whether the judgment is sustained by the evidence. The certificates of deposit issued to Mr. Lusher, beginning with one of $10,500 issued February 28, 1925, 12 in number, are all in evidence. Each bears on its face the then legal rate of interest. But Mr. Lusher always had a checking account at the bank, and the evidence shows that, when a certificate of deposit came due, his account would be credited with interest at the rate of 5 per cent., instead of 4 per cent. For example, from February 28, 1930, Mr. Lusher held a certificate for $15,000 due "12 months after date with interest at 4 per cent. per annum." On the exact day it was due, his checking account was credited with $750 interest, less $500 added to a new certificate, making the new one $15,500, issued February 28, 1931. This last-named certificate is the one on which the claim in suit is based. Since April 1, 1926, when the law reduced the rate, the history of the certificates, out of which this principal had been built up, shows this method of attempting to conceal the excess interest paid on the certificates in the checking account. In some instances, it should be said, the deposit slips, on which were adjusted the interest, clearly showed that the credit was for 5 per cent. on a definitely described certificate. The deposit slip of February 28, 1931, specifically shows that the interest on the $15,000 certificate due that day was credited at $750 and that $500 was taken out to add to the new certificate for $15,000 which is the one in suit. This deposit slip shows also a withdrawal by Mr. Lusher of $32.17 in cash, leaving him a net credit on the deposit slip of $217.83, which went into his checking account on that day.

The business was handled in his lifetime by Frank Maixner, the president of the bank, who died July 6, 1930, before the last certificate was issued. He and claimant are the only ones who could have testified positively and directly as to whether there was an oral agreement to pay more than the legal rate. Leo Stava was the cashier of the bank and sometimes fixed up the matter of claimant's cer-

tificates under orders from Mr. Maixner. He testified he had never discussed the rate with Mr. Lusher, but that claimant came into the bank about two months after Frank Maixner had died and "asked me if it was the same as before, and I said, 'Yes; Frank told me what to do.' I paid him 5 per cent. or he would want his money to go out." The witness does not know what Maixner told Mr. Lusher, but he told witness to pay 5 per cent. "I was never with them when they were transacting business. They went in the back room and Maixner came out or Mr. Maixner made out the certificate and instructed me and had me make out the draft for him." Mr. Stava, as cashier, executed the certificate sued on. At the time it was executed he paid or saw to it that the bank credited Lusher's account with $750 interest on the previous certificate of $15,000. Stava testified he had no agreement with Mr. Lusher to pay him more than 4 per cent. and never discussed the rate of interest with him. Stava testified, in addition to what we have heretofore quoted in this paragraph, that he did not have the money to pay the $15,000 certificate. To have refused to pay the 5 per cent. interest on it would have closed the bank, if Mr. Lusher had declined to renew and had demanded the money.

It is argued by appellant that John Lusher could not compute interest. He was put through some simple tests in arithmetic in his cross-examination and did not seem to be an ignorant man in such matters, but seemed able to compute interest on money. He testified that, as a boy in Illinois, he got half way through the Fourth Reader. He accumulated "five eighties of land." It overtaxes our credulity to be asked, in all the circumstances, to believe that Mr. Lusher was not conscious, each time he was credited with interest on his certificates of deposit, of the amount he was paid and that the rate was 5 per cent. and not 4 per cent. The circumstantial evidence is too strong. The trial judge saw and heard him and the other witnesses and concluded that the agreed rate was the higher one

and not that expressed in the certificate. We think the judgment was right. It is

AFFIRMED.

NORTHWESTERN BELL TELEPHONE COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

FILED MARCH 1, 1935. No. 29312.

1. **Telegraphs and Telephones**: RATES: DUE PROCESS OF LAW. Appellant having had an opportunity to make a defense in the hearing before the state railway commission, upon which hearing a 1934 depreciation rate was fixed, the order fixing the rate is not void because appellant was not thus afforded due process of law under the state and federal Constitutions.
2. ———: ———: JURISDICTION. Until the interstate commerce commission fixes the rates of depreciation upon local class A telephone company property for intrastate purposes, the state railway commission has jurisdiction and authority to prescribe such rates.
3. **Evidence** and record examined and the final order of the state railway commission affirmed.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

F. E. Randall and *Tracy J. Peycke*, for appellant.

Paul F. Good, Attorney General, and *Edwin Vail, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY, PAINE, and CARTER, JJ., and THOMSEN, District Judge.

GOSS, C. J.

This is an appeal from Nebraska state railway commission.

The matter was initiated by an order made by the commission November 29, 1933, directing all class A telephone companies (those having average annual operating revenues exceeding $100,000) and class B telephone companies (those exceeding $50,000 and up to $100,000) to file with the commission, not later than March 1, 1934, a schedule of depreciation rates by primary accounts which

they propose to apply for the year 1934, together with supporting data. Appellant is a class A company. It seasonably filed its return, but the commission, being dissatisfied, ordered the cause set for hearing March 19, 1934, for "oral examination of the members of respondent's staff, who prepared said schedules, and for the introduction of such evidence as the commission may desire to submit with opportunity of objections and cross-examination by respondent." The record and bill of exceptions show that attorneys and witnesses of appellant appeared and a hearing was held, lasting two days, and the record thereof covering upwards of 200 pages. An inventory and cost engineer and the general auditor of appellant and an accountant for the commission were examined and various schedules, calculations and exhibits were introduced in evidence. At the conclusion of the oral hearing, the cause was "submitted on the record," as appears both in the bill of exceptions and in the transcript of the pleadings, orders and filings.

On April 9, 1934, the record shows an opinion, finding and order. The commission reduced appellant's proposed rate of 4.48 per cent. and entered an order fixing a depreciation rate of 3½ per cent. upon depreciable property, including right of way, to be applied by the respondent for the year 1934.

Appellant presents four contentions:

First. That it was not given full notice of the scope of the hearing and full opportunity to make a defense in the 1934 depreciation rate; that therefore the order was void because it did not afford appellant due process of law under the state and federal Constitutions.

Second. That, since appellant is engaged in both interstate and intrastate commerce, and the congress has committed the matter of uniform accounting of common carriers of interstate commerce, including telephone companies, to the interstate commerce commission, the state commission was without authority to act on matters of accounting even with respect to intrastate commerce.

Third. That the order is void because it is not based on evidence sufficient to support it, and is contrary to the evidence.

Fourth. That the commission erred in denying the motion of appellant to vacate the order and to grant a hearing and a new trial.

The Constitution and laws of Nebraska "confer administrative and judicial powers upon the commission in addition to the main purpose of its creation, which is the exercise of legislative powers." *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245. The matter is not here for trial *de novo*, but for judicial review as to the legality of the order of which appellant complains. The appeal and procedure are provided for by section 75-505, Comp. St. 1929.

As to the claim that appellant had no sufficient notice of the scope of the hearing, the record shows that it appeared and for two days participated in the hearings and furnished its schedules showing the rates of depreciation on various kinds of property owned and used by it. Some of these percentage rates were high and others low, depending upon the character of the property to which the schedules applied. From them the company arrived at a composite rate of depreciation of 4.48 per cent. The commission fixed a composite rate of 3½ per cent. We are not afforded much help by the evidence or by the printed and oral arguments, in determining just how either the appellant or the commission reached their respective conclusions on this point. But when the record shows that all the evidence was taken that either party desired to offer and that the cause was submitted on the record without objections of any sort until after the decision, we think we ought not, in such a case, to reverse the action on the ground that, after the judgment was entered against a party, it can then claim it was taken by surprise as to the scope of the action. Indeed, even after the final order was entered, on the hearing of the motion for new trial, the parties stipulated (and it appears in the bill of exceptions) on May 15,

1934, for the admission of additional evidence. This was incorporated in the bill of exceptions in the form of a book of 101 pages on Uniform System of Accounts for Telephone Companies, issued by the interstate commerce commission in 1933. Until the motion for rehearing was filed, setting up the points now relied on, the record does not show that the commission as a court had any notice that appellant was aggrieved by the procedure. The evidence shows that counsel for the telephone company at the outset of the hearing suggested names of parties having to do with the calculation of the rate. Most of these were examined at length in a hearing apparently conducted with all the formality of any court. It appears all through the evidence that what the commission and telephone company were seeking was the proper evidence upon which to base a proper rate of depreciation to be used by the commission in 1934 only. If the telephone company had offered or proposed to offer other or further evidence and had been refused the opportunity, it would have presented a different question than that now before us. We think appellant had timely notice of the scope of the hearing, appeared generally, and was afforded due process of law in the matter.

"The due process provision of the Fourteenth Amendment has regard not to matters of form but to substance of right." *Western Life Indemnity Co. v. Rupp,* 235 U. S. 261.

Paragraph 5, sec. 20, title 49, U. S. C. A.—the interstate commerce act—authorizes the interstate commerce commission, in its discretion, to prescribe the forms of all types of accounts to be kept by carriers and makes it unlawful for such carriers to keep any other forms of accounts than those prescribed by the commission. Appellant argues therefrom that it has no right to keep, or to be required by the state railway commission to keep, its accounts in the form prescribed by the state commission. We do not find that the interstate commerce commission has ever seen fit to act upon the question of the rate of de-

preciation to be used in intrastate companies though they may do an interstate business. Even assuming that the congress has authorized such action (which we do not decide), and assuming that the ultimate decision would rest with the interstate commerce commission as to intrastate rates (which also we do not decide), and that the state railway commission would be bound by that decision, still, the federal commission not yet having acted upon the question, the state commission has the right to act until such time as the federal commission exercises its authority.

The supreme court, Chief Justice Hughes writing the opinion, said in *Smith v. Illinois Bell Telephone Co.* (1930) 282 U. S. 133 (on p. 159): "The company urges that, as Congress has granted jurisdiction to the Interstate Commerce Commission over the depreciation rates of telephone companies doing an interstate business (Interstate Commerce Act, sec. 20 (5), as amended by Transportation Act (February 28) 1920, U. S. C. A. title 49, sec. 20 (5), this subject is now completely withdrawn from the power of the state. It is said that two rates of depreciation cannot be charged on the same property. The Interstate Commerce Commission has had the matter under consideration (*Telephone and Railroad Depreciation Charges*, 118 I. C. C. 328-333) but, so far as we are advised, a final determination has not yet been made. The Interstate Commerce Commission has its accounting rules with reference to depreciation charges and, pending its order under section 20 (5) of the Interstate Commerce Act, telephone companies, as well as others subject to the act, have been directed to continue to observe these requirements. The company argues that, although the Interstate Commerce Commission has not finally ruled, the action taken by Congress excludes the jurisdiction of state tribunals under familiar principles (citing cases). We are unable to assent to this view. As the Interstate Commerce Commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in

relation to depreciation charges, but we are of the opinion that, in any event, until action has been taken which could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the state to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciation in connection with the intrastate business, are not to be gainsaid. Compare *Board of Railroad Commissioners v. Great Northern R. Co.*, 281 U. S. 412, 74 L. Ed. 936. Accordingly, the court should make appropriate findings with respect to the amount to be allowed in this case as an annual charge for depreciation in connection with the intrastate business." This case appears to be decisive authority on the precise point involved here.

Appellant relies upon *Interstate Commerce Commission v. Goodrich Transit Co.* (1912) 224 U. S. 194. That relates to an order of the interstate commerce commission "prescribing the method of accounts and bookkeeping as to the operating expenses of the carriers" of freight and passengers—in this case a steamship company operating on the Great Lakes. The commerce court had enjoined the operation of the rates as applied to intrastate business. The supreme court held the orders valid and reversed the cause. We think the case is not applicable here. If the interstate commerce commission had entered the field by prescribing depreciation rates for class A telephone companies to use in intrastate business, the principles of the cited case might be usable.

While we do not fully understand the logical processes by which appellant reached one rate and the appellee reached another rate of depreciation, yet, whether the rate here fixed is a legislative or judicial matter for the commission, it is, we think, a determination over which the commission had jurisdiction. It was for 1934 only and steps had already been taken to fix the rate for 1935. If the rate should prove to be confiscatory, if and when applied,

it is quite likely the appellant will be able to discover a remedy. We think the evidence was sufficient to support the order. Finding no reversible error in the proceedings, the final order of the railway commission is

AFFIRMED.

HOWARD C. MILLER, APPELLANT, V. J. W. MAUST ET AL., APPELLEES.

FILED MARCH 1, 1935. No. 29124.

1. **Forcible Entry and Detainer.** It is not the purpose of the action of forcible entry and detainer to determine the actual ownership or title to realty or the legal right to its possession.
2. ———. In an action of forcible entry and detainer, the ground of complaint is that the entry and detention were unlawful and forcible, absolute ownership or a possessory right not being a defense.
3. ———. In forcible entry and detainer, the nature of those acts constitutes the cause of action and not title to the realty.
4. ———. In an action of forcible entry and detainer, the character of the entry and detention is the test of plaintiff's right to recover, where the complaint charges that defendant's possession was obtained and held forcibly.
5. ———. One purpose of the act empowering a justice of the peace to determine the issue in an action of forcible entry and detainer is to prevent even rightful owners of realty from taking the law into their own hands and recovering by violence what the remedial powers of a court would grant.
6. ———. "A person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto." *Brown v. Feagins*, 37 Neb. 256, followed in *Tarpenning v. King*, 60 Neb. 213.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring and *Orville Baldwin*, for appellant.

Walter C. Weiss and *John L. Richards, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

ROSE, J.

This is an action of forcible entry and detainer. It was commenced in the county court of Thayer county. Howard C. Miller, plaintiff, pleaded in his complaint that, while he was in lawful and peaceable possession of the south 36 feet of the north 74 feet of lots 1 and 2 in block 13 in the original village of Carleton, on which is situated a building 18 feet wide and 60 feet long, during the night of November 1, 1933, or on the morning of November 2, 1933, J. W. Maust, Walter Schardt, John Raess, Henry Elting, Alec Dudgeon, Jr., and Alpheus Miller, defendants, broke the fastening on the padlocked door of the building, made an unlawful and forcible entry, and still hold possession of the premises by force; that plaintiff notified them November 3, 1933, to leave.

Defendants filed an answer containing a general denial, and alleging that the Farmers Union of Carleton was and now is in peaceable and lawful possession; that, of the Farmers Union, defendant Maust is president, defendant Schardt is secretary-treasurer, defendants Elting, Dudgeon Jr., and Raess are directors, and defendant Alpheus Miller is the new manager; that the Farmers Union is entitled to retain possession through the officers named.

Upon a trial of the cause the county court found defendants not guilty and dismissed the action. Plaintiff appealed to the district court and, at the conclusion of the testimony in a trial therein on the original pleadings, each side requested a peremptory instruction. The jury were excused and the action dismissed. Plaintiff appealed to the supreme court.

Plaintiff contends that, when in lawful and peaceable possession of the realty described in his complaint, defendants dispossessed him by forcible entry and detention, as shown by undisputed evidence; that, a forcible entry upon his actual possession having been conclusively proved, he was entitled to restitution, even if title and present right

of possession were in defendants; that questions of title and right of possession did not arise in the case, since plaintiff was in lawful and peaceable possession when wrongfully dispossessed by forcible entry.

On the contrary, it is argued by defendants that plaintiff had been the manager of the Farmers Union for 15 years or longer; that the possession which plaintiff claimed was the possession of the Farmers Union, his employer and master; that he was discharged as servant and manager, ordered to make a settlement and to permit defendants to take charge of the premises for the Farmers Union of which they were the officers; that plaintiff's occupancy was not possession in legal effect; that he was a trespasser when he retained his occupancy and refused to comply with the orders of his employer to turn the property over to defendants and to settle with them; that the severing of his occupancy and the termination of his services as manager were effected without a threat of personal violence or a breach of the peace; that the entry of defendants and their subsequent possession were lawful.

Plaintiff and defendants differed on what constituted the "Farmers Union." It was not a corporation or a partnership. There was nothing on a public record to show what it was. Nothing in the nature of a constitution or set of written by-laws was shown. It seems to have come into existence about 20 years ago as the "Farmers Equity" to buy and sell grain and stock and to purchase sugar, canned goods and other commodities. Later, 15 years ago, or earlier, it was named "Farmers Union" and its business was changed to buying and selling cream and poultry. There is testimony tending to prove it was a voluntary co-operative association, with a membership composed of farmers who patronized it. The realty where the business was conducted was deeded to the board of directors of the Farmers Union and their successors February 12, 1920. Since that date, until displaced November 2, 1933, plaintiff was the manager on a commission basis of 2 cents a pound for butter fat and ¾ or ½ of a cent a pound for poultry.

He had the key to the building and managed the business until displaced. He did not claim to own the real estate or to be a lessee or to have possession for himself. He testified that he held possession for the organizers of the Farmers Union, who were H. J. Schardt, F. P. Buck, W. E. Flory and himself. Defendants introduced in evidence the proceedings of a called meeting of members of the Farmers Union, indicating the election of defendants as officers or directors and the adoption of the following resolutions October 30, 1933:

"Be it resolved, that Howard Miller be discharged as manager of the Farmers Union, effective November 1, 1933, and that the new officers and directors be authorized to employ a new manager on such terms as they think best."

"Be it resolved that the new officers and directors be instructed to make a settlement, on behalf of the Farmers Union, with Mr. Miller on his account, and to take any necessary legal action either to secure such settlement, and or to make effective any and all other action directed by this meeting to be taken."

Defendants claimed plaintiff still owed them something as manager; demanded a settlement and charge of the premises and business October 30, or November 1, 1933; were told by plaintiff they could not take charge and "would have to take him by the seat of the pants and put him out." Evidence of those facts came from defendants, themselves. Thus warned in advance that plaintiff did not mean to be displaced except by personal violence, defendants, knowing that he claimed to be in lawful and peaceable possession of the premises, went to the building at an early hour in the morning, broke the fastening of the padlocked door in absence of the manager who had transacted the business conducted therein without interruption for 15 years, entered forcibly and retained exclusive occupancy, though part of the personal property therein belonged to plaintiff individually. The proper inference from the evidence is that personal violence was averted by stealth.

The resolutions authorized neither violence nor stealth. In view of the controversy anticipated by the resolutions and of the warning given to defendants before they entered the building, proceedings at law were more consistent with duty than force or stealth. Proved facts not in dispute seem to call for the application of the following principles of law as stated by Judge Sullivan:

"The purpose of the action was not to determine the actual ownership of the property or the legal right to its possession. The ground of complaint was that the entry and detention were unlawful and forcible, and the defendant could not justify by showing either an absolute ownership or a possessory right. 'Where the proceeding is for a forcible entry or for a forcible detainer,' say the supreme court of Wisconsin, in *Newton v. Leary*, 64 Wis. 190, 'it is the nature of the entry or detainer which constitutes the cause of action, and not the nature of the title which the respective parties have in the premises.' In *McCauley v. Weller*, 12 Cal. 500, 524, it is said: 'Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple title and present right of possession are shown to be in the defendant.' Our statute in plain terms makes the character of the entry and detention the test of the plaintiff's right when the complaint charges that the defendant's possession was obtained forcibly and is being held by force. Section 1019, Code of Civil Procedure, provides that if the justice shall determine 'that an unlawful and forcible entry has been made, and that the same lands or tenements are held by force, * * * then said justice shall cause the party complaining to have restitution thereof.' 'One great object of the forcible entry act,' says Gantt, J., in *Myers v. Koenig*, 5 Neb. 419, 422, 'is to prevent even rightful owners from taking the law into their own hands and attempting to recover by violence, what the remedial powers of a court would give them in a peaceful mode.'" *Tarpenning v. King*, 60 Neb. 213.

Nothwithstanding the views of the law thus approved, defendants argue that their acts in terminating the occupancy of plaintiff and in retaining possession were justified under the following doctrine:

"The occupancy of a house by a man hired to operate a farm for a certain monthly wage, and the use of the house thereon to live in with his family, is incidental to the employment, and the right thereto ceases with the termination of the service. In such case the possession of the employee is, in legal effect, the possession of the employer." *Davis v. Long*, 45 N. Dak. 581, 14 A. L. R. 796.

In that case the employee, after his occupancy had been terminated, sued his employer, the owner of the farm, for restitution of the premises and for statutory treble damages for unlawful detention. Other cases involving the same principle were also cited, including: *Heffelfinger v. Fulton*, 25 Ind. App. 33; *Napier v. Spielmann*, 111 N. Y. Supp. 983; *Schwinn v. Perkins*, 79 N. J. Law, 515, 32 L. R. A. n. s. 51; *Bowman v. Bradley*, 151 Pa. St. 351; *Kerrains v. People*, 60 N. Y. 221. The doctrine invoked by defendants, however, does not seem applicable to the case at bar. They did not claim possession for themselves, but for the Farmers Union. Plaintiff did not own or lease the realty but, as manager, asserted lawful and peaceable possession for the organizers of the Farmers Union, of which he claimed to be one. Defendants conceded that plaintiff had been in lawful and peaceable occupancy continuously for 15 years, but base their defense on the difference between "possession" and "occupancy." The Nebraska statute empowering a justice of the peace to determine the issue in an action of forcible entry and detainer uses the term "lawful and peaceable entry." Comp. St. 1929, sec. 21-1401. Defendants knew of plaintiff's claim and that he meant to resist theirs. By stealth and force they broke into the building in his absence and afterwards kept him out. The law does not recognize an advantage obtained by such

means. The following rule was stated in a former case:

"A person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto." *Brown v. Feagins*, 37 Neb. 256, followed in *Tarpenning v. King*, 60 Neb. 213.

It was the purpose of the statute relating to forcible entry and detainer to prevent parties to a litigable controversy like the present from taking the law into their own hands. The issue was not ownership or title, but "lawful and peaceable entry." On facts established without dispute, plaintiff was entitled to restitution, and for the purpose of granting him that relief on the record as it now stands the judgment is reversed and the cause remanded.

REVERSED.

Paine, J., dissents.

ELINOR NIPP, ADMINISTRATRIX, APPELLANT, V. PURITAN MANUFACTURING & SUPPLY COMPANY ET AL., APPELLEES.

FILED MARCH 1, 1935. No. 29165.

1. **Corporations:** PURCHASE OF STOCK. "A corporation, when not prohibited by its articles or by statute, may buy and sell its own stock, and hold, reissue or retire the same, provided such act is done in entire good faith and in no manner injures the rights of its creditors or its stockholders." *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370.
2. ———: OFFICERS: PURCHASE OF STOCK. An officer of a corporation, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he affirmatively shows that he has paid the full value of the property so purchased.
3. **Limitation of Actions.** The lapse of four years after the discovery of the facts alleged to constitute a fraud, or of facts sufficient to put a person on an inquiry, which, if pursued, would lead to such discovery, is a bar to an action brought for relief upon the ground of such fraud.

4. **Execution Sale:** COLLATERAL ATTACK. Where personal property has been lawfully seized by execution and a sale thereof had, the purchaser acquires a title which cannot be collaterally questioned in another action, even though the publication of the notice of sale might have been held defective if it had been properly assailed.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Hugh A. Myers and *W. A. Ehlers,* for appellant.

Waldron, Newkirk & Mathews and *E. B. Zabriskie, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

CARTER, J.

This is an action in the nature of a creditors' bill brought by Elinor Nipp, as special administratrix of the estate of Gilbert E. Nipp, deceased, against the Puritan Manufacturing Company, a corporation, Walter J. Charnley, A. J. Schmitz and L. V. Stout, impleaded with the Puritan Manufacturing & Supply Company, a corporation, appellees herein. From an adverse decree in the district court, the plaintiff below brings the case to this court for review.

It appears from the evidence that on and for a number of years prior to January 15, 1927, Gilbert E. Nipp had been president and general manager of the Puritan Manufacturing & Supply Company. At the beginning of the year 1927 the debts of the company amounted to $14,997.98. It also appears that at this time the company, under Nipp's management, had suffered losses on its contracts in a sum aggregating $15,781.13. On January 15, 1927, Nipp sold his stock in the company to the company for the sum of $8,876.66, payable $876.66 in cash or its equivalent, and the balance in thirty monthly instalments represented by the company's promissory notes. Nipp left the company immediately and was suc-

ceeded as president by Walter J. Charnley, one of the appellees herein, who, together with the other appellees, Stout and Schmitz, was a stockholder in the company until it ceased to do business.

The evidence further shows that in January, 1927, the company was being pressed by its creditors for payment of their claims and by the last of August of that year the company was unable to meet its payroll. It also appears that C. L. Waldron assisted in financing the company for a time, after which he was engaged as an attorney to straighten out the affairs of the corporation.

On March 21, 1927, the company filed a suit against Gilbert E. Nipp to enjoin him from negotiating the notes he obtained in the sale of his stock to the company, on the ground that he knew that the stock was worthless and that the stock transaction rendered the company insolvent. On September 19, 1927, the Concrete Engineering Company as a creditor intervened and attacked the stock transaction as a fraud on general creditors. On December 17, 1927, Floyd Woosley intervened in said suit, alleging that he had purchased the claims of all creditors, obtained a judgment thereon in the sum of $14,247.48, and made substantially the same attack upon the stock transaction and the notes held by Nipp arising therefrom as was made in the petition of intervention of the Concrete Engineering Company. This action was never prosecuted to final decree.

On November 25, 1927, Nipp commenced an action against the Puritan Manufacturing & Supply Company on the stock notes involved herein and on October 15, 1931, obtained a judgment for $2,055.71 on the ones that were due. During the fall of 1927, Walter J. Charnley, acting in the name of Floyd Woosley, purchased the claims of creditors against the company for thirty cents on the dollar, brought suit on them in Woosley's name on December 15, 1927, secured a voluntary appearance and confession of judgment from the company, obtained the judgment on December 16, 1927, for $14,247.48, and

on the next day intervened in the suit of Puritan Manufacturing & Supply Company v. Nipp, heretofore mentioned. An execution was promptly issued on Woosley's judgment against all the property of the Puritan Manufacturing & Supply Company and the same was sold to Woosley on January 5, 1928. Appellees contend that they operated the business as a partnership from September 1, 1927, to August 29, 1929, at which time the new corporation, Puritan Manufacturing Company, was organized. On February 15, 1933, this suit was commenced, alleging that the sale of the property to Woosley on execution sale January 5, 1928, was a fraud on the appellant as a general creditor, that the Puritan Manufacturing Company was a continuation of the Puritan Manufacturing & Supply Company and that its assets should be subjected to the judgment obtained by Nipp in his lifetime against the Puritan Manufacturing & Supply Company.

The record shows that at the time Gilbert E. Nipp sold out his interest in the Puritan Manufacturing & Supply Company to the company, Walter J. Charnley had $6,000 invested in the concern. Charnley was engaged as an engineer on construction work and testifies that he knew nothing of the financial condition of the company. After the deal for Nipp's stock was closed, he discovered that the corporation was insolvent. In order to save his investment he put additional funds into the corporation and obtained financial aid from C. L. Waldron. The testimony is very conclusive that Charnley used the name of Floyd Woosley and that Woosley at all times was acting for Charnley and had no interest in the business at any time. The evidence further discloses that, at the time Woosley was attempting to buy the outstanding notes and accounts held by the creditors of the Puritan Manufacturing & Supply Company for Charnley, Nipp knew of the transaction, as he was present at one of the creditors' meetings and participated therein. The cross-petition of Floyd Woosley filed December 17, 1927, in the

case of Puritan Manufacturing & Supply Company v. Nipp contained allegations that the assets of the corporation "should first be exhausted in payment of this intervener's judgment, and in payment of the claims of general and merchandise creditors." That this was notice to Nipp that the intent of Charnley was to pay all creditors in full before Nipp received anything on his judgment requires no argument. That the company had the right to purchase its own stock is not seriously disputed. The weight of authority seems to be that, if it does not appear to be in bad faith and injurious to the rights of its creditors or stockholders, a corporation, when not prevented by its articles or by statute, may buy and sell its own stock, and hold, issue, or retire the same. *Fremont Carriage Mfg. Co. v. Thomsen,* 65 Neb. 370; *Singhaus v. Piper,* 103 Neb. 493. That the sale of the stock to the corporation in the case at bar was injurious to the rights of creditors is amply shown by the evidence. In such cases, the weight of authority seems to be that, while a corporation may contract to purchase its own stock, it may not later, upon insolvency, pay for it until after the existing creditors have been paid. In the case of *In re Fechheimer Fishel Co.,* 212 Fed. 357, it was held: "If at the time the stockholder receives payment for his stock the payment prejudices the creditors, payment cannot be enforced. If a stockholder sells his stock to a corporation which issued it, he sells at his peril and assumes the risk of the consummation of the transaction without encroachment upon the funds which belong to the corporation in trust for the payment of its creditors."

It was also held in the case of *Crandall v. Lincoln,* 52 Conn. 73, at page 104, 52 Am. Rep. 560: "If the view we have taken of the character and nature of this stock is sound, and we have no doubt that it is, the conclusion inevitably follows that under no circumstances can a stockholder sell his stock to the company and take therefor his portion of the capital stock to the prejudice of creditors. The illegality of the transaction does not

at all depend upon the actual knowledge or *mala fides* of the seller; if he in fact sells to the company and receives in return a part of the capital, the policy of the law requires him to know it, and conclusively charges him with knowledge. Thus selling, he sells at his peril. In no other way can the rights of creditors be protected. The seller can protect himself by selling to other parties, or he may hold his stock, taking, as he is bound to, the risk of his investment. The creditor is not bound to assume any part of the stockholder's risk, and he has no way of protecting himself. The law is his only protection."

The above cases are not based upon local statutes but upon general principles. It is clear, therefore, in the case at bar, that Gilbert E. Nipp and his personal representative were at all times mentioned herein subsequent in their rights to those of general creditors. Charnley at all times stood in the position of the general creditors, having purchased their claims. The evidence shows that he bid in the assets of the company for more than their market value. It is apparent from the record that he gained no advantage because of the fact that he was president of the corporation. It has been held by this court: "An officer of a corporation for pecuniary profit, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser." *Horbach v. Marsh*, 37 Neb. 22. The evidence is very convincing that the appellees should come within this rule. In addition to the good faith of the appellees shown by the record, the evidence discloses that Gilbert E. Nipp had full knowledge of the transaction on December 17, 1927, when Woosley filed his petition in intervention in the case of Puritan Manufacturing & Supply Company v. Nipp. This action was commenced February 15, 1933, more than four years after Nipp had knowledge of the transaction, and also

more than four years after the sale of the corporation assets to Woosley, and it is clearly barred by the statute of limitations of this state. Comp. St. 1929, sec. 20-207. "The lapse of four years after the discovery of the alleged frauds, or of such facts as were sufficient to demand such investigation by plaintiff as would have disclosed the alleged frauds, bars an action brought for relief upon the ground of such frauds." *Horbach v. Marsh,* 37 Neb. 22. See, also, *Marshall v. Rowe,* 126 Neb. 817.

Appellant complains of the insufficiency of the published notice of the execution sale at which Charnley through Woosley purchased the property of the Puritan Manufacturing & Supply Company. The record shows that publication was made for seven days before the sale instead of ten as required by section 20-1525, Comp. St. 1929. This court in the case of *Darnell v. Mack,* 46 Neb. 740, after considering many cases on this subject, cites with approval the following: "That jurisdiction depends upon the lawful seizure of the property, and that subsequent defects may render the judgment erroneous, but not void." While it is true that the exact question discussed was not involved in *Darnell v. Mack,* yet the reasoning therein contained is also cited with approval in the case of *Brown v. Bose,* 55 Neb. 200, which holds: "That jurisdiction to order a sale depends upon the lawful seizure of the property, and that subsequent defects may render the judgment erroneous, but not void. * * * We could add nothing of value by going over the propositions considered in *Darnell v. Mack, supra,* and hence refrain from any attempts in that direction. The reasoning meets our approval, as applied to the facts of this case, and it is necessary merely to refer to that reasoning for a discussion of the pivotal question with which we are dealing."

We, therefore, hold that, where personal property has been lawfully seized by execution and a sale thereof had, a purchaser acquires a title which cannot be collaterally questioned in another action, even though the publication

of the notice of sale might have been held defective if it had been properly assailed. Appellant cannot, therefore, question the title obtained by Woolsey at the execution sale in the case at bar.

Upon a consideration of all the evidence, we arrive at the same conclusion as did the trial court that the transactions and proceedings attacked by appellant were not fraudulent, that the assets of the Puritan Manufacturing & Supply Company were sold on the execution sale at their full value and applied to the payment of the indebtedness owed by the Puritan Manufacturing & Supply Company to its existing general creditors, and that appellant has no claim in equity against any of the appellees herein.

AFFIRMED.

WALTER DEAN V. STATE OF NEBRASKA.

FILED MARCH 1, 1935. NO. 29398.

1. **Homicide**: INSTRUCTIONS. In a prosecution for murder in the first degree, it is not error to refuse to instruct the jury as to the law applicable to manslaughter, where the evidence conclusively establishes that the necessary elements of the crime of manslaughter do not exist.
2. **Criminal Law**: TRIAL: OFFER OF PROOF. "In a criminal trial, as well as civil, when to a question in direct examination an objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded." *Savary v. State*, 62 Neb. 166.
3. ———: ———: EXPERIMENTS. It is within the sound discretion of the trial court to grant or to refuse permission, pending trial, to either party to make a test or experiment in the presence of the jury either in or out of court for the purpose of using the result in evidence, and the trial court's ruling thereon will not be disturbed except for an abuse of that discretion.
4. **Homicide**: CONSPIRATORS. "Where two or more persons conspire and combine together to commit an unlawful act, and in

the prosecution of such common design one of the confederates commits a felonious homicide, each and all of such conspirators, as a matter of law, are guilty of such homicide." *Fields v. State*, 125 Neb. 290.

5. **Criminal Law**: INSTRUCTIONS. The instructions complained of by the defendant and set out in this opinion examined, and *held*, under the evidence in this case, to be free from prejudicial error.
6. ———: ARGUMENT OF COUNSEL. Where there is nothing in the record to show what was said by counsel in argument to the jury to which objections were taken, it will be presumed that no injustice resulted therefrom and that the trial court's rulings thereon were correct.
7. **Evidence** examined, and *held* to be sufficient to sustain a conviction of murder in the first degree.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

J. A. Hayward, for plaintiff in error.

William H. Wright, Attorney General, and *Paul P. Chaney, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

CARTER, J.

The plaintiff in error, who will be referred to herein as the defendant, was convicted in the district court for Lancaster county of first degree murder and sentenced to life imprisonment in the penitentiary. From the overruling of a motion for a new trial, the defendant prosecutes error and presents to this court a record of his conviction for review.

The evidence shows that on April 20, 1934, at about 12 o'clock, noon, the defendant Walter Dean, Sam Rivette and Aubrey Wray were traveling east on O street in Lincoln in a Studebaker automobile bearing a Texas license plate. At a point between Seventeenth and Eighteenth streets on O street, officers Volcott Condit and Frank Robbins of the Lincoln police force overtook

them and signalled them to pull over to the curb and stop. As the police car came alongside of the Texas car, officer Robbins stepped out to make an investigation, when a shot was fired from the Texas car at the police car, the bullet going through the glass in the right front door. The Texas car immediately dashed away with the police car in pursuit. The chase continued down O street with the defendant and his companions, or some of them, firing at the police car and the officers returning their fire. At Prairie Home, about 12 miles northeast of Lincoln, the Texas car went into the ditch and was disabled. In the fight that followed, Wray was killed and the defendant Dean and his companion Rivette were captured by the police.

At the time of the running fight down O street, Luceen Marshall, a 13-year-old boy, with his sister Lois and others, were standing near the corner of Twenty-fourth and O streets. They watched the two cars go by, having been attracted by the sound of the police siren and the shooting. Luceen Marshall suddenly dropped to the ground complaining that his leg was hurt. Bystanders discovered that he had been shot in the abdomen and rushed him to a hospital, where he died on April 23. The defendant and his companion, Rivette, were then charged with the murder of Luceen Marshall.

The defendant contends that the court erred in failing to instruct the jury that they could, if the evidence warranted, return a verdict finding the defendant guilty of manslaughter. The record discloses that the defendant and his associates were fleeing from the police officers and firing at them from their car. If the defendant, or either of his companions, while engaged in the commission of some unlawful act, pointed his gun at the deceased or at some other person and killed the deceased, and purposely fired the gun, then the intent to kill was present and the elements of the crime of manslaughter are wholly lacking. Manslaughter occurs when death follows without the slayer forming the specific

intent or purpose to kill. If the intent or purpose to kill is present, the crime is murder and not manslaughter. *Fields v. State,* 125 Neb. 290. There can be no question that the defendant and his companions were engaged in an unlawful purpose when they fired on the police, dashed away in their car, and engaged in a pitched battle in an attempt to avoid arrest. The record discloses no evidence of any sudden quarrel arising among the participants. For a jury to find, under the evidence in this case, that the shot that killed the deceased was accidentally or unintentionally fired would be contrary to reason and logic. The trial court was right in holding that reasonable minds could not differ on this point. The elements constituting the crime of manslaughter are not present and the charge of manslaughter was rightfully withdrawn from the jury.

The defendant complains of the exclusion by the trial court of certain evidence purporting to be the dying declarations of the deceased, Luceen Marshall. We are unable to determine from the record whether or not the dying declarations would have been admissible or whether their exclusion constituted prejudicial error for the reason that an offer of proof of the facts sought to be put in evidence was not made. This court has held: "The rule is, and it is applicable alike to criminal and civil trials, that when to a question in direct examination objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded." *Savary v. State,* 62 Neb. 166. The above rule is applicable to the case at bar and we cannot say that there was prejudicial error in the ruling of which the defendant complains.

The defendant complains of the refusal of the trial court to permit certain tests to be made in the presence of the jury by A. R. Mort, a witness called by the defense as an expert on ballistics. The defendant sought to have

the witness fire some bullets taken from the car in which defendant and his companions were riding into a piece of beef for the purpose of then comparing them with the bullet taken from the body of Luceen Marshall. We are of the opinion that no error was made by the trial court in refusing the request. The rule is that it is within the sound discretion of the trial court to grant or to refuse permission, pending trial, to either party to make an experiment in the presence of the jury either in or out of court with the purpose of using the result in evidence. 16 C. J. 810. The reasons for this rule are many. Oftentimes, as in the instant case, exhibits already in evidence are to be used in the test, one of the results of which would be a change in their condition. The trial court may have thought it important that they go to the jury as they were. Experiments before the jury should be allowed only where it is apparent that the jury would be enlightened thereby and, on the other hand, experiments and tests that would have a tendency to inflame the minds of the jury against either the state or the defendant should not be permitted. The same rule applies to an expert witness as to any other. The trial court must use his sound discretion in deciding whether or not the test or experiment should be permitted and, in the absence of an abuse of such discretion, error cannot be predicated from his ruling thereon. The trial court did not abuse his discretion in refusing to permit the experiment or test being made in the instant case and his ruling cannot be made the subject of error.

Defendant complains of the giving of certain of the instructions to the jury, the first of which, No. 12, is as follows: "It is immaterial whether the police officers of the city of Lincoln had a right to stop the car in which the defendant and two companions were riding and it is further immaterial whether the defendant Walter Dean and two others had a right to ignore the request of said officers to stop, provided you find from the evidence beyond a reasonable doubt that they did ignore such a

request. However, if said Dean or his companions or any of them, in their effort to escape from said officers, commenced shooting first, at said officers, then such shooting was an act of committing a felony and it then became the right and the duty of the police officers to pursue and arrest the occupants of the car in which the defendant was riding." Defendant contends this instruction to be erroneous in that it instructs the jury that whether or not the police had a right to stop the car and compel its occupants to submit to an investigation is immaterial. Defendant's counsel bases his argument on the assumption that an illegal arrest was being attempted. The evidence does not sustain this contention. The officers were not attempting to arrest the defendant and his companions, but were attempting to investigate the car, its occupants and contents. Whether their action was right or wrong was not material. Assuming that the officers were in the wrong, the defendant and his companions were not warranted in taking the law into their own hands and commencing to shoot without any provocation. They clearly committed a felony in so doing and it became the duty of the officers to immediately pursue and arrest them. Under the evidence produced in this case, the instruction complained of is not prejudicial to the defendant.

Defendant next complains of instruction No. 13, which is as follows:

"If you find from the evidence in the case beyond a reasonable doubt, that the defendant and two companions, Rivette and Wray, were traveling together in an automobile, with a common criminal purpose and design in mind; that they had deliberately armed themselves with deadly weapons; refused to be questioned by police officers to the extent of fleeing from them in their automobile, and while fleeing from the police officers they first shot at the police officers and one of their bullets killed the deceased, a bystander, all are equally guilty of the homicide.

"And if you find from the evidence beyond a reasonable doubt, that it was the intent of the defendant and his two companions to resist the officers to the extent of purposely killing and the death of the deceased was the result; and if you further find the deceased was killed of deliberate and premeditated malice by one of the three, all are equally guilty of the homicide."

Counsel for the defendant contends that this instruction assumes a state of facts not reflected by the evidence, namely, that the defendant and his companions had deliberately armed themselves and were traveling with some common criminal purpose or design in mind. To this we cannot agree. We must not lose sight of the fact that the intent, purpose or design by which a person acts is seldom capable of proof by direct and positive evidence and must be inferred by the jury from his acts and the circumstances surrounding the place of the alleged crime. The trial court properly permitted the state to show that the defendant and his companions had in their possession a .44 Winchester rifle, a .38 Smith and Weston revolver, a .32 Colt automatic pistol, loaded shells for all of said guns, $903.14, of which the defendant had $221.02, Wray the sum of $230.27, and Rivette $227.05. The balance of the amount was found along the highway and in the car. The evidence further shows that the $903.14 was made up of 20 five-dollar bills, 26 ten-dollar bills, 12 twenty-dollar bills, 53 one-dollar bills, 805 nickels, 470 dimes, 341 quarters, 160 half dollars and 280 pennies. This evidence, coupled with the fact that defendant and his companions did use their guns at the first sign of interference by law enforcement officers, is sufficient to sustain a finding by a jury that they were traveling with a common criminal purpose and design in mind, that they had deliberately armed themselves with deadly weapons, and that it was their intention, to the extent of killing, to resist any officer who might interfere with them in any way. The instruction does not assume a state of facts, but instructs the jury that, if they find the facts

set out to be true, defendant would be guilty of the homicide. That this is a proper way of instructing a jury there can be no doubt. The court properly gave this instruction in view of the evidence produced in this case.

Defendant also contends that instruction No. 14 is erroneous. It is as follows: "The court further instructs the jury that where three persons determined to resist arrest in case an attempt to arrest them is made, and said persons deliberately supplied themselves with arms and weapons for the purpose of killing any one who might be attempting to arrest, and in an encounter which followed an attempt to arrest the persons a third person was killed by one of them all three of said persons are guilty of murder in the first degree, providing that you find beyond a reasonable doubt that said killing was done purposely, deliberately and of their premeditated malice." This instruction is clearly the law of this state. This court has held: "Where two or more persons conspire and combine together to commit an unlawful act, and in the prosecution of such common design one of the confederates commits a felonious homicide, each and all of such conspirators, as a matter of law, are guilty of such homicide." *Fields v. State,* 125 Neb. 290. In the opinion in the case last above mentioned, the rule is well set out as follows: "It is a familiar general rule that when several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine. Applying the principle to the subject under consideration, the courts hold that if several persons combine or conspire to do an unlawful act, and in the prosecution of the common object a culpable homicide results, all are alike criminally responsible. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his

own; and all are equally criminal." Quoting from 13 R. C. L. 729, sec. 29.

The case of *Fields v. State,* hereinbefore mentioned, also quotes the following with approval: "If the unlawful act agreed to be done is dangerous * * * or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his coconspirators may do in futherance of the common design. Accordingly, one person may be held liable for the homicidal act of another, where such act results from their combined efforts to commit robbery, burglary, breaking in and stealing, or assault merely." 13 R. C. L. 730, sec. 31.

Instruction No. 14 heretofore set out in full, follows this rule and is a correct statement of the law. The evidence is sufficient to support the giving of the instruction and the objection to it is without merit.

The defendant also complains of the conduct of the county attorney in his argument to the jury. It appears from the record that counsel for the defendant interposed several objections to the argument made by the county attorney, but nowhere in the record are the alleged prejudicial statements set out. If the alleged improper statements of the county attorney in his argument are not set forth in the record, this court is unable to say whether or not they were improper and prejudicial. Under such circumstances, the presumption must be that the trial court ruled correctly on the objections. In the case of *Jones v. Niagara Junction R. Co.,* 71 N. Y. Supp. 647, it was held: "Complaint was made that injustice resulted to the defendant because of the remarks of counsel in summing up the case. There is nothing to show what was said by the counsel to which the objections were taken, and therefore there is no reason to suppose that any injustice resulted. The presumption must be the other way." While this was a civil action, the rule is

just as applicable to a criminal proceeding. It has been the settled law of this state that error must affirmatively appear of record, and if the basis of the alleged error is not included in the record, it cannot be considered by this court on appeal. *Berg v. Griffiths,* 127 Neb. 501.

The defendant further contends that the verdict is not sustained by the evidence. Defendant argues that the bullet taken from the body of Luceen Marshall was fired from a rifle and that the defendant never had a rifle in his hands. It is true that defendant's companion Wray and officer Robbins were the only persons using rifles at the time of this unfortunate occurrence. Wray was using a .44 Winchester rifle. In view of the fact that it was clearly established by the evidence that the defendant, Rivette and Wray were associated together in the commission of an unlawful act, it is necessary for the state to show that one of the three fired the fatal shot in order to sustain the conviction. The evidence shows that the bullet taken from the body of Luceen Marshall was a .44 caliber rifle bullet and that defendant or his companions were the only ones shooting a .44 caliber rifle. The evidence also discloses that neither of the police officers used a .44 rifle that day.

At the time Luceen Marshall was shot, he was standing near the intersection of Twenty-fourth and O streets on the north side of O street. At the time he fell to the ground, the police car was about a block east of him and defendant's car was approximately a half block farther east from the police car. The defendant and his companions, or some of them, were firing toward the west at the police car and in the general direction of the deceased, while officer Robbins was shooting toward the Texas car in which defendant was riding and in the opposite direction from where deceased was standing. The evidence is quite conclusive that Luceen Marshall was killed by a .44 caliber bullet fired from the .44 rifle in the hands of either Dean, Rivette or Wray. It makes no difference which one actually did the shooting, as under the evidence

in this case all must answer for the homicide, the act of one being the act of all, and all would be equally guilty. The evidence clearly is sufficient to support the verdict.

There being no prejudicial error in the record, and the evidence being sufficient to sustain the verdict, the judgment of the district court is

AFFIRMED.

SAM RIVETTE V. STATE OF NEBRASKA.

FILED MARCH 1, 1935. No. 29399.

1. Criminal Law: INSTRUCTIONS. The fact that a single clause of an instruction is incomplete is not sufficient ground for a reversal, if, when the whole paragraph is read and construed together, its meaning is clear and certain, and it appears from the record that the jury could not have been misled thereby. *Blair v. State*, 72 Neb. 501.
2. ———: ———. The instructions given to a jury upon a trial are to be considered as a whole and construed together. If, when so considered and construed, they present no erroneous statements of law, the fact that an isolated instruction may be indefinite or incomplete will not be considered prejudicially erroneous if the law is fully and correctly stated in other instructions. *White v. State*, 88 Neb. 177.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

J. A. Hayward, for plaintiff in error.

William H. Wright, Attorney General, and *Paul P. Chaney, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

CARTER, J.

The evidence in this case is for all practicable purposes the same as in the case of *Dean v. State, ante*, p. 466. They were argued together in this court and present identical assignments of error, except that in-

struction No. 14 in the present case varies from the corresponding instruction given in the *Dean* case to such an extent as to require the consideration of this court.

Instruction No. 14 given by the trial court in the case at bar is as follows: "The court further instructs the jury that where three persons determined to resist arrest in case an attempt to arrest them is made, and said persons deliberately supplied themselves with arms and weapons for the purpose of killing any one who might be attempting to arrest, and in an encounter which followed an attempt to arrest the persons a third person was killed, all three of said persons are guilty of murder in the first degree, providing that you find beyond a reasonable doubt that said killing was done purposely, deliberately and of their premeditated malice."

It will be noted from this instruction that the jury were not told in concise language that the killing must have been committed by one of the three persons engaged in the unlawful act. The words "by one of them" used in the *Dean* case were apparently omitted by inadvertence. The defendant contends that this is prejudicial error. The first and second instructions set out in *Dean v. State, ante,* p. 466, were given in the identical language in the case at bar. In instruction No. 13 the jury were positively instructed that the killing must have been done by Dean, Rivette or Wray. The case was tried on that theory. The instruction in question, No. 14, is not as definite as it should be. It does, however, contain the following statements: "Where *three persons* determined to resist arrest * * * and *said persons* deliberately supplied themselves with arms * * * *all three of said persons* are guilty * * * providing * * * said killing was done purposely, deliberately and of *their* premeditated malice." (Italics ours.) A careful consideration of the instruction will show that the jury were instructed that they must find that the killing was done by one of the three persons. The instruction does not contradict any of the other instructions properly given. This court has held that, where a single

clause of an instruction is incomplete, it is not a sufficient ground for reversal, if, when the whole paragraph is read together, its meaning is clear and certain and it appears from the record that the jury could not have been misled thereby. *Blair v. State,* 72 Neb. 501. This instruction, when considered in connection with the other instructions given in the case, did not mislead the jury. In instruction No. 13 they were told: "And if you further find the deceased was killed of deliberate and premeditated malice *by one of the three,* all are equally guilty of the homicide." (Italics ours.) In instruction No. 15 they were told: "If, from the evidence, you are satisfied beyond a reasonable doubt that the defendant Sam Rivette, Walter Dean and the deceased Wray had entered into a conspiracy or agreement with each other to resist arrest, or that all three had such an intention if the occasion required, and had for that purpose procured weapons intending to use them and in so resisting arrest *one of them* shot Luceen Marshall and that the other two were present aiding and abetting and assisting in every way possible to further their escape, it is immaterial *which one of the three* resisting arrest fired the fatal shot, for the fatal shot is regarded in law to be the shot of any one of them or all of them." (Italics ours.) It seems clear that the jury were informed, in considering the instructions as a whole, that it was necessary for the state to show that defendant Sam Rivette, Walter Dean or Aubrey Wray fired the shot that killed Luceen Marshall. If the instructions, considered as a whole and construed together, present no erroneous statements of law, the fact that an isolated instruction may be indefinite or incomplete will not be considered prejudicially erroneous if the law is fully and correctly stated in other instructions. *White v. State,* 88 Neb. 177. The error complained of was not prejudicial to the defendant.

All other errors alleged in this case are identical with those considered in *Dean v. State, ante,* p. 466, and for the reasons set out in the opinion in that case, we hold that they were without prejudice to the defendant.

The record is free from prejudicial error and the judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEBRASKA STATE SAVINGS BANK OF WAHOO, E. H. LUIKART, RECEIVER, APPELLEE: HANNAH FRANSON ET AL., INTERVENERS, APPELLANTS.

FILED MARCH 1, 1935. No. 29068.

1. **Banks and Banking**: INSOLVENCY: TRUST FUNDS. A *cestui que trust* must prove that his property or its proceeds wrongfully entered into and became a part of the assets of the trustee bank, and that his property or the proceeds thereof entered into and augmented the assets of the trustee bank.
2. **Trial**. Where a case is tried upon agreed stipulation of facts and oral and written evidence, it is proper to consider all the evidence, even though part of it may be inconsistent with the stipulation of fact.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Hendricks & Kokjer, for appellants.

F. C. Radke, Barlow Nye, W. A. Crossland and *J. F. Berggren, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and LIVINGSTON, District Judge.

LIVINGSTON, District Judge.

The appellants here separately intervened in the lower court in the receivership proceedings prosecuted for the purpose of closing up the affairs of the Nebraska State Savings Bank of Wahoo, insolvent, each seeking to impress a constructive trust upon certain assets in the hands of the receiver. For the purpose of trial, the claims were consolidated and tried on the same evidence. The lower court found against the interveners and dismissed their petitions. From this judgment appeal was taken.

On April 14, 1925, August Christenson and wife executed a series of notes due May 1, 1930, secured by mortgages on subdivisions of a large tract of land in Saunders county. All these notes and mortgages named the insolvent savings bank as payee and mortgagee. It appears that these notes and mortgages were made on printed blanks, naming the bank as such. These investment papers were prepared in this form for the sole purpose of negotiation and sale to investors. The bank had extended no credit to the makers and had no pecuniary interest in the loans. One of these notes for $3,500, secured by a mortgage on an eighty-acre subdivision of said tract, was sold to the Bank of Yutan May 1, 1925, by F. J. Kirchman, president of the said defunct savings bank, and on November 21, 1925, he sold the same note and mortgage to the intervener, Hannah Franson. The note was indorsed in blank, such indorsement being in the name of the bank, by F. J. Kirchman, president, and a written assignment of the mortgage executed in the name of the bank by the said Kirchman, as president, delivered with the mortgage papers to the intervener Franson.

On August 4, 1925, the intervener Thorstenson purchased from the said Kirchman another one of said Christenson notes for $3,500, dated and maturing the same as the one sold to Mrs. Franson, and secured by a mortgage on another eighty-acre subdivision of the Christenson land. Transfer of papers was made in the same manner as the Franson transaction, except the indorsement on this note named Thorstenson as indorsee.

The defunct savings bank and the Saunders County National Bank transacted their business in separate parts of the same banking room and F. J. Kirchman was the president and active executive officer of each bank. Both banks became insolvent and went into the hands of separate receivers about the same time.

The defunct savings bank held a second mortgage on the entire tract of land owned by Christenson for $7,300. This mortgage was a lien second to both mortgages negotiated to the interveners.

Both interveners transacted their business in the purchase of said mortgages in the president's office of the Saunders County National Bank, with the said Kirchman who was president of both banking institutions, and both interveners were told that it was unnecessary to record the assignment of the mortgage, and each intervener left all papers in a private or special deposit box in the Saunders County National Bank.

About March 1, 1930, one Oberg purchased two hundred acres of the Christenson tract of land, which included the two eighty-acre tracts covered by the mortgages assigned to the interveners. The purchase price was $200 an acre, or $40,000. Payment was made by check for $19,827 on the Bank of Cedar Bluffs and three mortgages of $3,500 each and one for $2,500, and by giving credit for the balance on a debt owing from Christenson to the purchaser Oberg. These mortgages were made to the now defunct savings bank and by agreement between the vendor and purchaser were to be hypothecated with the purchaser's attorney who examined the title to be delivered to the said Kirchman upon his delivery to said attorney of releases of the Christenson mortgages. The check was deposited in the defunct savings bank to the credit of Christenson. The proceeds of this check seem to have been exhausted in payment of debts of Christenson, other than interveners' mortgages.

Kirchman, in order to facilitate the closing of this transaction, ignoring the unrecorded assignments to interveners of their mortgages in his custody in the Saunders County National Bank, executed, as president of the savings bank, a release of the mortgages assigned to the interveners and the second mortgage of the savings bank for $7,300 and delivered the same to Oberg's attorney and received from him two mortgages executed by Oberg, each for $3,500, and one for $2,500. The mortgages were disposed of by Kirchman. He had promised Mrs. Franson one of the $3,500 mortgages which was on a subdivision of said tract of land of a description different from the description of

the lands covered by the Christenson mortgage which she held. Instead of doing this, he sold this mortgage to the Oak Creek Valley Bank. Subsequently this mortgage was sold by this bank for full value to the Saunders County National Bank and thereafter sold by the Saunders County National Bank to the savings bank for full value.

Kirchman admitted these transactions but insisted that he had hoped by some change of fortune he would be able to secure this mortgage for Mrs. Franson, but the closing of the savings bank rendered this impossible. This mortgage is beyond cavil a part of the assets of the defunct savings bank. Each of the interveners received his or her Christenson mortgage from the receiver of the Saunders County National Bank.

The burden of proof rested on the interveners to prove that their mortgages or other mortgages or money received in their stead wrongfully entered into and became a part of the assets of the defunct savings bank and thereby augmented the assets of said savings bank. *State v. Farmers State Bank,* 121 Neb. 532; *Central Nat. Bank v. First Nat. Bank,* 115 Neb. 444, 472; *City of Lincoln v. Morrison,* 64 Neb. 822; *United States Nat. Bank v. D. W. Standrod & Co.,* 42 Idaho, 711; *Kent v. Kent,* 50 Utah, 48; *State v. Columbus State Bank,* 124 Neb. 231; *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225; *State v. Nebraska State Savings Bank,* 127 Neb. 832.

At the beginning of the trial in the lower court, there was a stipulation placed in the record to the effect that the Christenson mortgage and note were purchased by the intervener, Mrs. Franson, from the savings bank and that she paid full value therefor to said savings bank. An analysis of all of the testimony of the witness F. J. Kirchman and of other witnesses offered by the interveners clearly contradicts the stipulation and impeaches it. Where there is a stipulation of fact and other evidence, it is proper to consider all the evidence, even though a part of the evidence adduced be inconsistent with the facts stipulated. *Hunt v. Van Burg,* 75 Neb. 304; 60 C. J. 84.

The interveners failed to sustain the burden of proof to establish the facts necessary to entitle them to a finding and judgment that their mortgages or their proceeds wrongfully entered into, and became a part of, the assets of the savings bank and that they augmented its assets, and wholly failed to trace the said mortgages or their proceeds in any form into the assets of said savings bank.

The finding and judgment of the lower court is fully supported by the record and should be, and is,

AFFIRMED.

IN RE ESTATE OF BARBARA LADMAN. JAMES LADMAN, APPELLEE, V. MARY LOGAN ET AL., APPELLANTS.

FILED MARCH 1, 1935. NO. 29116.

1. Wills: PROBATE: NOTICE. Objection was made to the petition for the administration of an estate, that the decedent died testate, and that her will was lost. Upon the hearing on the petition pursuant to statutory notice, the county court found and decreed that the decedent died intestate and issued letters of administration. In such a case, the county court is not required to give notice for the probate of a lost will.
2. ———: REVOCATION: PRESUMPTION. "Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death the presumption is that the testator destroyed it *animo revocandi*." *Williams v. Miles*, 68 Neb. 463.
3. ———: ———: ———. "But this is a presumption of fact only. It may be overcome by the evidence, circumstantial or otherwise, to the contrary; and declarations of the testator may be shown for this purpose." *Williams v. Miles*, 68 Neb. 463.
4. ———: PROBATE: DIRECTION OF VERDICT. Record examined and found that the evidence, on any issue presented, is not such that different conclusions might reasonably be drawn therefrom, so that the trial court properly directed a verdict against objectors.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Guy A. Hamilton and *E. J. Steinacher*, for appellants.

Waring & Waring and *Sloans, Keenan & Corbitt, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and MUNDAY, District Judge.

MUNDAY, District Judge.

Barbara Ladman was born in Bohemia and came to America when a child, and later married John Ladman. Five children were the issue of this marriage, all of whom are living. After the marriage they lived on 80 acres of land in Fillmore county, and title of this was in the husband's name. Some time later a quarter-section of land was purchased in Saline county and title to this land was taken in the name of the wife. In about 1895 the husband and wife were unable to live peaceably together and separated and remained separated until her death on December 26, 1932. They were never divorced. At the time of the separation the husband and wife conveyed by deed their interest in the land in Fillmore county to their son Joseph, but a life estate was reserved therein to the husband. The wife with four children then moved to the land in Saline county, and later the children left and went to do for themselves. After the children left her, the wife purchased a house in Milligan, Nebraska, and lived there a greater part of the time until her death. After the husband and wife separated, he lived on the land in Fillmore county for a short time and later with a relative, and in 1913 the husband went to Montana, where he located on a homestead and lived with his son James. About a month before the wife's death, she was seriously ill and all the children came to visit her except one son. At that time the wife, Barbara Ladman, sent for Charles Smrha, her local banker, and asked him to draw her will and gave him instructions as to how it should dispose of her property. In pursuance of these instructions, Mr. Smrha drew the will in English on a printed form, and there is no contention but that it was executed as provided by law. The will

was then delivered to the Farmers & Merchants Bank of Milligan for safe-keeping. Mr. Smrha then prepared a statement of the contents of the will in the Bohemian language and left this statement with Mrs. Ladman. There is no contention in this case that Barbara Ladman was not competent to direct the making of her will.

A day or two after the will was made and when she had learned that some court proceedings would be necessary to probate the will, Mrs. Ladman again talked with Mr. Smrha and asked that a different disposition of her property be made. Mr. Smrha then suggested a new plan for disposal of her property and drew a contract for her and the children to sign. This contract was then signed by Barbara Ladman and all of her children save the one who was not present, and one of the other children signed for him. Mr. Smrha then destroyed the will by tearing or burning the same. No other or different will was ever written for her or found by any one among her effects.

In April, 1933, the son, James Ladman, filed a petition in the county court for the settlement of his mother's estate, and alleged therein that she died intestate. A day was set for hearing of this petition and legal notice given. At the hearing of this petition in the county court the children, Emil and Anna, appeared and objected to the petition filed by James, and alleged that their mother did not die intestate, but that she died testate and that her will was lost. The county court heard the evidence on May 2, 1933, the day set for hearing of said petition, and found from the evidence and decreed that Barbara Ladman died intestate. From this decision an appeal was taken to the district court, where a trial was had to a jury. After the introduction of all the evidence the court on motion peremptorily directed the jury to return a verdict that Barbara Ladman died intestate. In the district court a sister, Mary Logan, joined with Emil and Anna Ladman, and the three are now appellants in this court. The father and the children, John, Joseph and James Ladman, with the administrator, are appellees.

The appellants assign many errors on the part of the trial court, but only a small number of these were really considered and presented. They contend: (1) That the county court had no jurisdiction to hear the petition because it did not publish notice for the probate of the alleged lost will; (2) that the alleged revocation does not comply with the statute; (3) error in exclusion of declarations of the testatrix on the issue of whether there was an intention on the part of the testatrix to revoke her will; (4) that the alleged acts of destruction constituted only dependent relative revocation; (5) that the court should not have directed the jury to return a verdict that decedent died intestate.

The appellants urge that the county court had no jurisdiction in the case because the petition alleged that Barbara Ladman died intestate, and that in their objections they denied that she died intestate, and further alleged a lost will, and that no notice of a hearing for a probate of the alleged lost will was given in the county court; that for this reason the county court had no jurisdiction to hear the petition. There is no question but that the notice required by law was given of the hearing on the petition, and that the parties appeared and a hearing was had on the day fixed in said notice, and that appellants were in court and appealed from the decision of the county court. Appellants had a right to appear in the county court and contest any of the material allegations of the petition. They availed themselves of this right. The fact that the appellants alleged a lost will in order to defeat the petition did not make it obligatory on the county court to cause to be published a notice for the probate of the alleged lost will, when the court found decedent died intestate. If the court had found that such will had not been lost or was not revoked, then it could have ordered a proper publication for its probate. But that is not an issue in this case and we do not determine that question. The appellants pleaded as a fact to defeat the petition that the decedent died testate and that there was a will, and this was decided

against them and there was nothing more for the county court to do but to enter judgment on the petition.

Mr. Smrha gave the only competent testimony as to the destruction and revocation of the will. He testified in part relative to this subject: "Q. And what was that conversation, or the substance of it; what had she called you to do? A. She wanted me to make a different disposition of her money; the days that had intervened since the will was drawn, the family had been talking about the disposition of the property, and she learned that in order to carry out the provisions of the will it would be necessary that it be taken into court, that some court procedure and the services of attorneys would be necessary to make that will binding, or carry out the provisions of the will, and she didn't want the settlement, or the distribution of her property to be made in a manner which would require any court proceedings. Q. What did she want you to do then? A. She asked me to write, or prepare a settlement or agreement where the property could be divided without court proceeding. Q. Did you make such an agreement or disposition of her property? A. I did. Q. What was done with the will then? A. The will was destroyed. Q. Well, describe in what manner it was destroyed. A. After visiting—after visiting her and learning from her what her wishes were, that she wanted this property distributed in some manner which would not require court proceedings, I went to the bank and prepared an agreement in line with her wishes; then I took this agreement and the certificate of deposit and the will back to the house. This agreement was read to Mrs. Ladman, I prepared a Bohemian translation, and we read it to her in Bohemian, and thereupon all of the children signed this new agreement and Mrs. Ladman signed this new agreement, and I asked her if she desired this agreement to take the place of the will that she had drawn, and she said that she did; so this will was destroyed by me. Q. Where? A. In the house. Q. In what manner? A. My memory isn't clear as to the manner of its destruction, but I tore it up;

I tore it up, and my recollection is that I burned it, but I am not sure of having burned it, but I know that I tore it up. Q. And in the house, and in her presence? A. Yes; and in the room where all these people were. Q. And Mrs. Ladman was there, the mother? A. Yes, sir. Q. Who asked you to tear it up, or destroy it? A. They didn't ask me to tear it up, but asked me to destroy it, and have this agreement take the place of the will. Q. Handing you what has been marked as plaintiff's exhibit 1 * * * I will ask you to examine that exhibit, and after you have examined it will you state what it is? A. Yes, sir. This is the agreement written in the Bohemian language, making disposition of her property the way she wanted it divided. Q. That was to take the place of the will? A. Yes, sir. Q. And is Barbara Ladman's name signed to that instrument? A. It is. Q. Did you see her sign it? A. I did. Q. Whose are the other signatures on that instrument? A. Joe Ladman, Anna Ladman, Mrs. Mary Logan, James Ladman, and Emil Ladman, by Anna, his sister. Q. Were all of those people present with the exception of Emil? A. They were. Q. They all signed there in the house? A. Yes, sir. Q. Who was the witness? A. I was. * * * Q. You stated you destroyed this will after this other disposition of the property was planned? A. Not planned; after it had been made."

There was quite a lengthy cross-examination of this witness, but the facts developed were in substance the same as set out above.

Section 30-210, Comp. St. 1929, is controlling: "No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codocil in writing, executed as prescribed in this article; or by some other writing, signed, attested and subscribed in the manner provided in this article, for the execution of a will; excepting only, that nothing contained in this section shall prevent the revocation implied by law

from subsequent changes in the conditions or circumstances of the testator."

There was no testimony adduced or offered that in any way contradicted or impeached this testimony of Smrha. We believe the record and the evidence show an absolute and unconditional revocation of the will. 68 C. J. 799; *In re Estate of Nelson,* 183 Minn. 295.

The appellants contend that the trial court erred in excluding the declarations of the testatrix as to whether her will had been destroyed with the intention on her part of revoking the same. Such declarations are competent for this purpose where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, to rebut the presumption that the testator destroyed his will *animo revocandi. Williams v. Miles,* 68 Neb. 463. However, there is no evidence in this case showing that the will was left in the possession of the testatrix. It was first left at the bank and later taken before the testatrix and torn or burnt in her presence. So this rule of law has no application to this case.

But if this rule of law were applicable to this case, the appellants have not pointed out in their brief, nor have we been able after a careful study of the record to discover, where any declarations of the testatrix as to her not revoking her will were not received by the court. At question 348 in the bill of exceptions the court overruled the objection of the appellees to such testimony, but in answer the witness related no conversation. At question 350 the court stated: "You tell what she said if you can remember the exact words; if not, give us the substance of it." Then the witness, when permitted to answer, did not state anything that was said. There was an exclusion of evidence by the court regarding a conversation about the will, but the question was objectionable on other grounds.

It is further urged by appellants that whatever revocation there was of the will was a dependent relative revocation. The intention to revoke a will may be made on condition, and if the condition is not fulfilled the revoca-

tion does not take effect. Also this doctrine is sometimes applied where a will is destroyed by mistake. The doctrine of such revocation is put in 68 C. J. 800 as follows:

"The doctrine is not applicable where the act of destruction is not referable, wholly and solely, to the intention of setting up some other testamentary paper, as where it appears that the intention of the testator was to revoke totally and absolutely," etc.

The evidence in this case discloses an absolute and unqualified revocation of the will without any condition or mistake. The new contract disposing of her property, agreed to by Barbara Ladman and her children, was entered into before the will was torn or burned. Mrs. Ladman informed the scrivener that she did not want her will and did not want to dispose of her property that way and proceeded to dispose of it in another way. The way she disposed of her property was entirely independent of her revocation of the will. That there is a misunderstanding between the heirs of decedent in carrying out the terms of the contract does not revive the revoked will. There is no serious claim that the will was not destroyed as provided by the statute, but it is claimed that the act of destruction of the will was not accompanied by the intention of the testatrix to revoke her will. While revocation of a will rests upon the intent of the testator (1 Jarmon, Wills (7th ed.) 132), we are of the opinion that the facts as to tearing or burning of this will, in the presence of the testatrix, under the circumstances of this case as shown by the evidence, show conclusively that the destruction of the will was done at her direction with a revocatory intent. Therefore, the doctrine of dependent relative revocation does not apply to this case. *In re Estate of Nelson, supra*; 68 C. J. 799; 28 R. C. L. 182, sec. 141.

The evidence as to any material issue is not conflicting and is not such that different conclusions might reasonably be drawn therefrom, and the trial court properly withdrew the issue from the jury as to whether or not decedent died testate. We think there has been a fair trial

without prejudicial error and a correct conclusion reached, and that this court should not interfere.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF BEE, E. H. LUIKART, RECEIVER, APPELLEE: ANTON SEMRAD, ADMINISTRATOR, ET AL., INTERVENERS, APPELLANTS.

FILED MARCH 8, 1935. No. 29209.

1. Banks and Banking: INSOLVENCY: CLAIMS: PROOF. To make a *prima facie* case on a claim against the receiver of an insolvent state bank, the claimant need only plead and prove ownership of a duly issued certificate of deposit.
2. ———: ———: ———: DEFENSES. It is the duty of the receiver, if he wishes to avail himself of any statutory defense to a duly issued certificate of deposit, to plead and prove such defense.
3. Cases Overruled. *State v. Security State Bank*, 116 Neb. 223, *State v. Farmers State Bank*, 111 Neb. 117, and *Kuhle v. Farmers State Bank of Cotesfield*, 115 Neb. 648, so far as they conflict herewith, are overruled.

APPEAL from the district court for Seward county: HARRY D. LANDIS, JUDGE. *Reversed.*

H. A. Bryant and *Charles H. Hood*, for appellants.

F. C. Radke, Barlow Nye and *Thomas, Vail & Jones, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOSS, C. J.

The receiver of the State Bank of Bee duly classified the claim of Vaclav Cink and Anna Cink as invalid. The claim was based upon their certificate of deposit for $2,500, dated July 2, 1930, due in 12 months with interest at 4 per cent. To raise the issue, they filed their petition of intervention setting forth the certificate (but not pleading

that there was no other or different contract between them and the bank than that evidenced by the certificate itself) and praying classification as a deposit. Vaclav Cink died after the petition of intervention was filed and the cause was duly revived as to him in the name of Anton Semrad, administrator with the will annexed.

The receiver moved to strike the petition on the ground that it did not state facts sufficient to constitute a cause of action or to present a claim to priority over the claims of general creditors. The court sustained this motion and gave interveners permission to amend instanter by interlineation. Interveners complied by amending so as to allege that "there was no agreement, written or otherwise, for interest on said certificate in excess of 4 per cent. per annum nor did interveners receive interest in excess thereof." The answer of the receiver merely admitted the issuance of the certificate of deposit by the bank and his classification of it, but denied each and every other allegation in the petition of intervention.

On the trial interveners proved title and ownership of the certificate and rested without further proof. The receiver demurred to the evidence, and the court sustained the demurrer on the ground that, under the Nebraska decisions, the interveners had not sustained the burden entitling them to priority over general creditors of the bank. Interveners appealed.

The assignments of error are that the judgment is contrary to the law and the evidence and is not sustained by the evidence.

Our Code of Civil Procedure (Comp. St. 1929, sec. 20-837) provides: "In an action, counterclaim, or set-off, founded upon an account, promissory note, bill of exchange, or other instrument for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specific sum, which he claims with interest."

The interveners pleaded just that, but were in effect directed by the court to negative the exception in section 8-140, Comp. St. 1929, preventing deposits made after April 1, 1926, from being entitled to priority of payment from the assets, if there be an agreement, direct or indirect, to pay more than 4 per cent. interest thereon. They complied with the order and so pleaded, but offered no proof other than the certificate, which provided for the payment of interest on the deposit at the legal rate of 4 per cent.

In making this ruling as to the amendment of the petition and in the judgment on the merits, we apprehend the district court relied upon the language in *State v. Security State Bank of Eddyville,* 116 Neb. 223, where, in the first point of the syllabus, it was said:

"One who claims to have deposited money in a state bank, commercial, and seeks to have such claim allowed and ordered paid out of the depositors' guaranty fund after the bank has become insolvent and the receiver thereof has objected to it as an invalid claim, must prove, not only that a deposit of money or its equivalent was made, but, further, that it was made under circumstances which do not transgress specific limitations of the bank guaranty law."

We do not think the term "burden of proof" so often used in the opinion just cited and in cases used in the argument in the opinion, was there employed in the sense that is sought to be applied by the appellee here. It said nothing about the burden of pleading the claim to be free of any of the inhibitions of the statute as resting, in the first instance, upon the claimant who sought in that case to have his deposit paid out of the guaranty fund. In fact, in that case the question was first raised by a pleading of the receiver, objecting to the allowance of the claim on the ground that there was a collateral agreement on the part of the bank, when the money was deposited, that the officers of the bank would write and assist solicitors of claimant, an insurance company, to write insurance policies.

Thereupon the insurance company filed its answer to these objections, which answer was really a reply, denying that the money was deposited under any collateral agreement. The bill of exceptions is not accessible, but the transcript and briefs, which remain a part of the permanent records of this court, show that the evidence was entirely stipulated. There is an indication that the order of proofs followed the pleadings; that is, the deposit was stipulated and then the letters that passed between claimants and the bank officers were stipulated, indicating to the satisfaction of the trial court, and, on review *de novo,* to this court, that the weight of the evidence, or the preponderance of the evidence, favored the defense pleaded by the receiver for the bank.

The first case cited as to the "burden of proof" in the *Security State Bank of Eddyville* case is *State v. Farmers State Bank of Halsey,* 111 Neb. 117. Only the following, from page 122 of that opinion, was quoted: "A holder of a certificate of deposit in a bank who seeks to hold the guaranty fund liable for its payment must show that the transaction leading up to the issuance of the certificate was such that the law holds the guaranty fund liable for its payment." This was said *arguendo* and is nowhere reflected in the syllabus of the case, where the law is supposed to be stated. There is nothing in the opinion in *State v. Farmers State Bank of Halsey,* 111 Neb. 117, to suggest that the pleading followed any other than the customary course wherein the claimants set up their claim and the receiver pleaded his defenses under the statute.

The opinion in the *Security State Bank of Eddyville* case also cites, as its last authority on the particular point, *Kuhle v. Farmers State Bank of Cotesfield,* 115 Neb. 648, as containing in syllabus No. 1 a reaffirmation of *State v. Farmers State Bank of Halsey,* 111 Neb. 117. That syllabus is an exact quotation of what we have in the paragraph last above quoted and stated, was said *arguendo,* and not made a part of the syllabus of the case in which it originated.

So it seems perfectly clear that what was said about the "burden of proof" in *State v. Security State Bank of Eddyville, supra,* and cases cited therein and analyzed here, was not necessary to those decisions and was not really intended to establish a requirement that the plaintiff need plead and in the first instance prove, in compliance with section 20-837, Civil Code, heretofore quoted, more than the existence of a deposit, in the instant case evidenced by a certificate of deposit, in his favor. It then becomes the duty of the receiver of the bank, if it be a fact, to plead and to offer proof of some infringement of the statute inhibiting the allowance of a claim for a deposit. If there has been an agreement to pay an unlawful rate of interest or an agreement that the bank render some prohibited service in consideration of the deposit, or if there exist some other collateral agreement, the books and accounts, the correspondence and the files of the bank would probably show evidences thereof, all of which would be accessible to the receiver and would be easily interpretable by him and his employees trained in such matters. While, in such a case as that before us, where an original claimant has died, the evidence could not be readily obtained. The certificate of deposit in this case was *prima facie* evidence of a lawful deposit. If it was based upon an illegal agreement in some form or other denounced by a statute, it was, we think, the duty of the receiver to plead and offer proof upon such point. That is the conventional method of pleadings and proof.

Under the subject of pleading statutory exceptions and provisos, R. C. L. has this to say: "But when the exception is contained in a proviso, and not in the enacting clause, the party pleading the statute need not negative the exception. It is for the other party to set it up in avoidance of the general provisions of the statute." 21 R. C. L. 463, sec. 29, citing *Cram v. Chicago, B. & Q. R. Co.,* 84 Neb. 607.

"Ordinarily, a plaintiff need not in his complaint anticipate or negative a possible defense. He is required to

state only such facts as will constitute, *prima facie*, a cause of action." 21 R. C. L. 491, sec. 55.

Accordingly, we adopt the following rules:

(1) To make a *prima facie* case on a claim against the receiver of an insolvent state bank, the claimant need only plead and prove ownership of a duly issued certificate of deposit.

(2) It is the duty of the receiver, if he wishes to avail himself of any statutory defense to a duly issued certificate of deposit, to plead and prove such defense.

(3) *State v. Security State Bank*, 116 Neb. 223, *State v. Farmers State Bank*, 111 Neb. 117, 122, and *Kuhle v. Farmers State Bank of Cotesfield*, 115 Neb. 648, so far as they conflict herewith, are overruled.

The judgment of the district court is reversed and the cause remanded for proceedings in harmony with this opinion.

REVERSED.

PAUL H. ANDREWS, APPELLEE, V. COMMERCIAL CASUALTY INSURANCE COMPANY, APPELLANT.

FILED MARCH 8, 1935. No. 29159.

1. Trial. Where both plaintiff and defendant in an action at law move for a peremptory instruction at the close of all the evidence, the trial court may excuse the jury and determine the issues by findings equivalent to the verdict of a jury.
2. Insurance: AUTOMOBILE LIABILITY INSURANCE POLICY: "HOUSEHOLD." In an automobile liability insurance policy, the word "household" in an omnibus clause extending the liability available to assured to other members of the household means "Those who dwell under the same roof and compose a family."
3. ———: ———: LIABILITY. In an action on an automobile liability insurance policy, an omnibus clause extending the liability available to the assured to any person while riding in or legally operating her car with her permission or with the permission of an adult member of her household, evidence *held* to sustain a finding that the liability extended to her adult brother.

4. Judgment: RES JUDICATA. Where the issues and parties in two separate actions were different, a judgment in the first *held* not *res judicata* as a defense in the second.
5. Appeal. Rulings restricting cross-examination of a witness and refusing to permit the amendment of an answer during the trial are largely in the discretion of the trial court and are not reversible as errors in absence of an abuse of such discretion.
6. Insurance: ATTORNEY'S FEES. In allowing an attorney's fee to be taxed as costs in addition to a judgment in favor of plaintiff in an action on an automobile liability insurance policy, the trial court may consider the amount involved; the responsibility assumed; the questions of law raised; the time and labor necessarily required in the performance of duties; the results of service performed; professional diligence and skill.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

Frost, Hammes & Nimtz, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

ROSE, J.

This is an action on an automobile liability insurance policy issued by Commercial Casualty Insurance Company, assurer, defendant, to Louise Marvin, named assured, July 21, 1930. To the limit of $5,000 the insurance covered liability imposed by law upon her for damages on account of bodily injuries accidentally suffered by her, or any other person within the terms of the insurance risk, by reason of the ownership, maintenance and use of a Ford sedan owned by her. By the terms of the policy, defendant, calling itself the "Company," bound itself as follows:

"To pay the expense of litigation and all costs taxed against the assured in any legal proceeding defended by the company, and all interest accruing after entry of any judgment until the company has paid, tendered or deposited in court such part of such judgment as does not

exceed the limit of the company's liability as expressed in this policy. * * *

"That the terms and conditions of the policy are so extended as to be available, in the same manner and under the same conditions as they are available to the named assured, to any person or persons while riding in or legally operating any of the automobiles described in the warranties, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or, if the named assured is an individual, with the permission of an adult member of the named assured's household other than a chauffeur or a domestic servant, except that the terms and conditions of this policy shall not be available to a public automobile garage, automobile repair shop, automobile sales agency, automobile service station and the agents or employees thereof."

When the policy was in force July 4, 1931, Paul H. Andrews, plaintiff, was injured in a collision between an automobile in which he was riding and assured's Ford sedan while being driven by her brother, Fred Daniels.

In a former action for negligence causing the collision and resulting damages to plaintiff, the latter recovered a judgment October 24, 1932, against Fred Daniels, defendant therein, for $2,500, which was reduced by remittitur to $1,700 and which, for the latter sum and interest, is in full force.

The purpose of the present action is to recover from defendant herein, the assurer, under the omnibus coverage clause quoted, the adjudicated damages sustained by plaintiff in the former action, on the theory that the policy issued to Louise Marvin, the "named assured," covered liability for the negligence of her brother, the petition alleging that he was driving her sedan with her permission at the time of the accident; that he was then an adult member of her household; that he was driving at the time with the permission of Anna Daniels, an adult member of assured's household and the mother of both assured and Fred Daniels; that execution was issued on the former judg-

ment and returned unsatisfied; that the judgment debtor is insolvent and unable to pay the debt.

The answer admits execution of the policy, the accident, some injury to plaintiff and recovery of the judgment. It also contains pleas that the policy does not cover liability for injuries inflicted on plaintiff by Fred Daniels; that defendant is not liable for the unpaid debt evidenced by the former judgment from which there was no appeal; that plaintiff at the former trial invoked the "family purpose doctrine" in automobile law to show that assured and Fred Daniels were jointly liable, an issue determined against them, and that plaintiff is thus estopped by the former adjudication to claim herein that the Ford sedan was driven with the permission of assured or that Anna Daniels was a member of assured's household. Unadmitted allegations of the petition were denied in the answer and unadmitted allegations in the answer were denied in the reply.

At the close of all the evidence in the present action on the policy, each side moved for a peremptory instruction, thus submitting the case to the presiding judge who excused the jury and rendered a judgment in favor of plaintiff for $1,898.79, the amount of the former judgment and interest. Defendant appealed.

It is first argued that the trial court erred in overruling the motion to direct a verdict in favor of defendant. The argument is based on the propositions that the evidence proves Fred Daniels was not at the time of the accident driving the Ford sedan of Louise Marvin, the "named assured," either with her permission or with the permission of an adult member of her household, and that the question whether Fred Daniels or his mother, Anna Daniels, were members of assured's family or household was adjudicated adversely to the contention of plaintiff in the former action.

On the issues of fact, the findings of the district court in favor of plaintiff in the case at bar are, on appeal, equivalent to the verdict of a jury. The sufficiency of the

evidence to sustain the judgment, therefore, is the first question for determination. The omnibus coverage clause of the policy, in connection with the entire contract, is the basis of liability. As applied to the case at bar, it extends the liability available to the named insured, Louise Marvin, to any person while riding in or legally operating her Ford sedan, provided such use or operation is with her permission or with the permission of an adult member of her household.

The word "household" was used in the policy in its ordinary sense as understood in common parlance. As defined by Webster it means, in the insurance contract, "Those who dwell under the same roof and compose a family." Living under the same roof in the same house, when the accident occurred and for some time prior thereto, were the named assured, Louise Marvin, Fred Daniels, her brother, and her mother, Anna Daniels. All contributed to the expenses of the home. Each was an adult member of the household. There is testimony tending to prove that assured permitted her brother to use the car; that he did use it; that he used it for assured's children and for his mother; that the key was available to him; that assured never objected to his taking the car when she was not using it or when she was away from home; that assured notified defendant that her brother drove the car with her permission; that the mother, an adult member of the household, gave him permission to use it. Permission in writing was not required by the policy. General permission when the owner was not using her car was fairly shown. Special permission for the trip on which the accident occurred was not necessary under the circumstances. In any event, Fred Daniels, being an adult member of the household, could give himself permission to use his sister's car, within the meaning of the omnibus coverage clause of the policy. On these issues the evidence is held sufficient to sustain the finding and judgment of the district court.

The defense of *res judicata* does not seem to be well founded. The former action to recover damages for per-

sonal injuries was brought by plaintiff herein against Fred Daniels, the negligent driver of the Ford car, and his sister, Louise Marvin. The latter was charged with liability for her brother's negligence under the family purpose doctrine, but she was dismissed from the case on the ground that doctrine was not applicable to the facts. The first action was based on the negligence of the driver of the car, Fred Daniels, and the alleged liability of Louise Marvin depended on the family purpose doctrine alone. Defendant herein was not a party to the former action. Liability in the case at bar is predicated on contract—the omnibus coverage clause in connection with the entire policy. The family purpose doctrine is not involved herein. Fred Daniels, the negligent driver, is not a party to the second suit. The issues and parties in the two cases, therefore, were not identical. It follows that the trial court properly held *res judicata* was no defense.

Rulings restricting the cross-examination of a witness and disallowing an amendment of the answer during the trial are challenged as erroneous. An examination of the record in these respects shows clearly that the rulings were within the unabused discretion of the trial court.

One of the assignments of error is directed to the allowance of an attorney's fee of $350 as excessive. The statute authorizes a reasonable sum as an attorney's fee to be taxed as costs in addition to a judgment on a liability insurance policy. Comp. St. 1929, sec. 44-346. While the allowance is reviewable on appeal, the trial court, in view of all the facts and circumstances, determines in the first instance, in the exercise of sound discretion, what is a reasonable sum. An arbitrary percentage of the recovery on the policy is not necessarily the test. Among the factors in the problem, the court may consider the amount involved; the responsibility assumed; the questions of law raised; the time and labor necessarily required in the performance of duties; the result of service performed; professional diligence and skill. *In re Estate of Rhea,* 126 Neb. 571. Whatever is shown in these particulars or ob-

served by the trial judge in the course of the proceedings is open to him for consideration. With these factors in mind, there does not seem to have been an abuse of discretion or an excessive allowance, when the entire record is considered. An additional attorney's fee of $150 will be taxed as costs for services of counsel for plaintiff in the supreme court.

Not finding in the record any error prejudicial to defendant, the judgment of the district court is

AFFIRMED.

ROSE VOLCHECK, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED MARCH 8, 1935. No. 29433.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: DEPARTURE FROM INSTRUCTION. In a proceeding under the workmen's compensation law, whether a departure from instructions by the employer to the employee defeats compensation depends largely upon the facts and circumstances of each particular case.
2. ———: ———: ———. "Mere disobedience by the servant of the master's order regarding the manner in which work is to be performed will not operate to remove the servant from the sphere of his duties." *Hibberd v. Hughey*, 110 Neb. 744.
3. ———: ———: DEPARTURE FROM SCOPE OF EMPLOYMENT. In a proceeding under the workmen's compensation law, a messenger boy does not necessarily depart from the scope of his employment by using his bicycle in delivering a telegram, instead of complying with his employer's directions to take a street car, the use of the bicycle being an authorized method of travel in such service.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Francis R. Stark, Brogan, Ellick & Shoemaker and *J. J. Fitzgerald, Jr.*, for appellant.

Reed, Ramacciotti & Robinson and *Albert F. Wahl, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. Arthur Volcheck, 19 years of age, was employee. His mother, Rose Volcheck, is plaintiff. The Western Union Telegraph Company was employer and is defendant. The employee had been in the service of defendant as a messenger boy. Plaintiff claims that she is a dependent within the meaning of the workmen's compensation law; that while her son was engaged in the duties of his employment, returning on his bicycle to his employer's office February 5, 1933, at 12:45 a. m., after delivering a telegram, he was struck by an automobile and fatally injured; that the accident arose out of and in the course of his employment; that plaintiff is entitled to compensation which has not been paid. The defense interposed was that the messenger disobeyed an order of his employer to go to and return from the place of delivery by street car, for which he received car fare, and that consequently his fatal injuries, while attempting to return on his bicycle, did not "arise out of and in the course of his employment." The compensation commissioner rejected plaintiff's claim, and she appealed to the district court where she was awarded $6 a week for 350 weeks, $150 for the purpose of burial and $223.25 for medical expenses. Defendant appealed to the supreme court.

On appeal it is argued by defendant that the allowance of compensation was erroneous because plaintiff did not prove the accidental injury arose out of and in the course of the employment. The position taken by the employer is "that as soon as messenger Volcheck violated the order to take the street car and started out on his bicycle, he thereby removed himself from the scope of his employment because he was not at a place where he reasonably should have been." In support of this proposition defendant cites *Hibberd v. Hughey,* 110 Neb. 744, wherein the following doctrine was announced:

"Disobedience of a positive order as to the place where work is to be performed, resulting in injury to the servant

arising out of the place selected by him, constitutes a departure from his employment, and such injury cannot be said to 'arise out of and in the course of' his employment within the meaning of the employers' liability law."

Whether a departure from instructions defeats compensation depends largely upon the facts and circumstances of each particular case. *McCrary v. Wolff*, 109 Neb. 796. In the present instance Arthur Volcheck had been a regularly employed messenger in the service of defendant. Before midnight February 4, 1933, he and other messenger boys were in defendant's main office, Fourteenth and Farnam streets, Omaha, awaiting calls for the delivery of messages. At the same time, C. Nelsen, night manager of defendant's delivery department, was on duty there. He called "19," which meant Volcheck, who promptly reported for service. What then occurred and the instructions given were told by Nelsen on the witness-stand as follows:

"I called the number and I gave him a message to the German Home at 4206 South Thirteenth street, and when I gave it to him I gave him two car checks and I told him to go to Fourteenth and Howard and get a car going east on Howard street, that would say 'Albright' on it, and it would go down to Thirteenth and Howard and then turn south on Thirteenth and it would take him right in front of the door."

Nelsen testified further that he related all of the transaction at the time and that he did not remember of then saying anything more. However, he was permitted to explain the giving of his specific directions as to the line of travel by observing that changes had been made in the routing of street cars. He also gave reasons for his order to take a street car by saying that it was a long distance to the place of delivery, that the weather was cold, that the streets were slippery and that riding was dangerous. His direct testimony that he told the boy to take a street car was weakened to some extent on cross-examination by the statement that what he probably said was, "You can catch it."

With the weather at zero the boy mounted his wheel, went to the German Home, delivered the message, started back to the office where duty called, was struck from the rear by an automobile on Thirteenth street, was fatally injured and died February 6, 1933.

There was no positive order forbidding the use of the bicycle. There is nothing in the record to show that the messenger boy was guilty of wilful negligence barring compensation within the meaning of the workmen's compensation law. He was not outside the zone or sphere of his employment. He was injured in the street on which the street car ran—the one he was directed to take. A photograph of the pavement where the accident occurred was admitted in evidence and does not indicate a dangerous place for the use of a bicycle. There is no proof that either cold or distance contributed to the accident. The message was in fact delivered and the messenger was on his way back to his employer's office. A manual of instructions to messenger boys is in the bill of exceptions. Messengers were required to read the manual. The instructions therein dealt with manners, clothing and equipment and emphasized dependableness as the sum of big factors in qualifications and service. The rules recognize the use of bicycles in making deliveries. Messenger Volcheck did not indulge himself in the comfort and safety afforded by street cars, but went on his wheel about midnight regardless of distance, of cold and of slippery pavements. In spite of the elements he made the trip to the German Home in safety. On his way back he was injured only when run down by an automobile in the rear. From all the circumstances it is a reasonable and proper inference that the boy did not make such a departure from instructions as to remove himself from the scope of his employment or make his injury noncompensable. The better view of the evidence is that the case falls within the following principle:

"Mere disobedience by the servant of the master's order regarding the manner in which work is to be performed

will not operate to remove the servant from the sphere of his duties." *Hibberd v. Hughey,* 110 Neb. 744.

In this view of the law and of the facts outlined, the judgment of the district court should be and is

AFFIRMED.

ABRAHAM L. TIDD, APPELLEE, V. C. LAWRENCE STULL, APPELLANT.

FILED MARCH 8, 1935. No. 29201.

1. **Appeal.** The inadvertent substitution of the word "plaintiff" for "defendant" in an instruction, where it is clear that the jury could not be misled thereby, is, at most, harmless error. A judgment will not be reversed for such an error.
2. **Trial: INSTRUCTIONS.** Where the trial court has instructed the jury as to the law applicable to the issues raised by the pleadings and supported by evidence, it is not required, in the absence of a request, to go further and elaborate on any other phase of the evidence.
3. **Appeal.** A verdict, based on conflicting evidence, in a law action, will not be disturbed on appeal unless clearly wrong.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

W. A. Robertson, for appellant.

Abraham L. Tidd, pro se.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

This is an action to recover for services rendered as an attorney. Defendant admitted the employment of plaintiff in three different actions, and alleged that in two of them the amount of attorney's fees had been agreed upon and fully paid; that in the third case plaintiff commenced and was to carry to final determination an action, but withdrew before the trial and, therefore, was entitled to no fee in that case. Defendant also filed a cross-bill in which he

alleged that he had paid to plaintiff certain specified sums for expenses, and that plaintiff had not incurred expenses to the amount of the payments, and prayed for the difference between payments and the actual expenses. A trial to a jury resulted in a verdict for plaintiff for the full amount of his claim and no allowance to defendant upon his cross-claim. Defendant has appealed.

In this court defendant alleges error in the rulings of the court on the admission and rejection of evidence, but points to no place in the record where such rulings appear, and a careful reading of the bill of exceptions fails to disclose any error in that respect.

Defendant complains of several instructions given by the court to the jury, particularly of the first instruction, in which the court fully outlined to the jury the issues presented by the pleadings, but in one place inadvertently used the word "plaintiff" where it should have read "defendant." That part of the instruction reads: "That the plaintiff appeared as such attorney in said suits and performed certain legal services for and on behalf of the *plaintiff*." From a reading of the whole instruction and the entire charge to the jury, it is apparent that it was an inadvertent substitution of the word "plaintiff" for "defendant." No one could have been misled thereby, and, while it was technically erroneous, it was not prejudicial. A judgment will not be reversed for harmless error.

Complaint is also made of one of the instructions of the court, wherein the jury were informed, in effect, that, if an attorney withdrew from a case without just cause after he had undertaken the trial of the case, he could not recover anything for the services rendered in such action, but that, if he had reasonable grounds for withdrawing, he was entitled to recover for the value of the services rendered. It is complained that the court did not fully define what would constitute just cause for an attorney withdrawing from a case before the completion of the trial. The facts were fully before the jury and were sufficient to justify plaintiff's withdrawal from the case. De-

fendant requested no instruction. Had he desired a more elaborate statement, he should have prepared and submitted an instruction covering that point. The instructions of the court covered every issue raised by the pleadings. The court was not required to go further unless requested so to do.

It is insisted that the evidence is insufficient to sustain the verdict. The evidence shows that plaintiff tried two cases for defendant in the district court for Perkins county, for which services he claimed $250; also that plaintiff began an action for defendant in the district court for Cass county, and, after filing a petition and first and second amended petitions therein, withdrew from the case. Plaintiff claimed the service was worth $75. Two reputable attorneys testified to the value of the services rendered by the plaintiff and fully substantiated his contention for the amount claimed for all the services rendered. The only evidence to the contrary was given on behalf of defendant to the effect that plaintiff had undertaken to perform services in the district court for Perkins county for an agreed amount; that plaintiff had been fully paid therefor; that plaintiff had undertaken a trial of the cause in the district court for Cass county, but had withdrawn from the case without its being carried to completion, and that therefore he was entitled to nothing in that cause. The evidence of plaintiff was to the effect that there was no agreement as to amount of compensation, and that he was entitled to the reasonable value of the services rendered.

This presented a question of fact. The evidence was in conflict. The cause was properly submitted to the jury. Their finding is conclusive.

We find no prejudicial error in the record. Judgment AFFIRMED.

PLATTSMOUTH LOAN & BUILDING ASSOCIATION, APPELLANT, V. JOSEPH SEDLAK, JR., ET AL., APPELLEES.

FILED MARCH 8, 1935. No. 29185.

1. **Dismissal and Nonsuit.** A final submission of an action, within the purview of section 20-601, Comp. St. 1929, contemplates its submission upon both law and fact.
2. ———: ———. In an action tried to the court, where the evidence has been concluded and the court grants leave to counsel to file briefs within a stipulated time, the action is not finally submitted as required by section 20-601, Comp. St. 1929, until such briefs are filed, or until the time for filing same has expired.
3. ———: ———. "A plaintiff has an absolute right to dismiss his action at any time before the final submission of the cause, subject alone to compliance with conditions precedent, such as the payment of costs, etc., as may be imposed by the court." *Beals, Torrey & Co. v. Western Union Telegraph Co.*, 53 Neb. 601.
4. ———: ———. "A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant to proceed to the trial of a set-off or counterclaim properly pleaded by him in his answer." *Adams v. Osgood*, 55 Neb. 766.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed in part, and reversed in part.*

Charles E. Martin and *A. L. Tidd,* for appellant.

Dwyer & Dwyer, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

This action was filed on May 19, 1933, by the appellant to foreclose a real estate mortgage given by the appellees Joseph Sedlak, Jr., and Hermie M. Sedlak, his wife, on certain lots in Plattsmouth, Nebraska, to secure a note for $2,500. On October 24, 1933, the defendants filed an amended answer in which they alleged that the note secured by the mortgage had been paid, that the mortgage sued on was not executed before or acknowledged by a

notary or any one authorized or qualified to take acknowledgments and that the property was defendants' homestead at the time and that said mortgage is therefore void. On November 4, 1933, the appellee Fred Duda filed his amended answer and cross-petition in which he prayed for the foreclosure of a second mortgage held by him on the premises. On November 25, 1933, replies were filed, and on December 23, 1933, the case proceeded to trial. On December 26, 1933, the taking of evidence was concluded and the court entered the following order: "Argument was had and the cause submitted to the court and thereupon said cause was taken under advisement. It is ordered that each side be and is hereby allowed 5 days in which to file briefs." On December 29, 1933, appellant filed a dismissal of its petition without prejudice. On the day following, a motion to dismiss was filed. On January 6, 1934, the appellees Sedlak were granted permission to amend the prayer of their answer praying that the mortgage of appellant declared upon be adjudicated void and be canceled of record and the cloud thereof removed from their title. The court thereupon overruled the motion to dismiss, decreed the mortgage of appellant to be void, and granted appellee Duda a foreclosure of his mortgage as a first lien. The appellant brings the case to this court for review. Appellant contends that it had dismissed its petition without prejudice in due time, that the court had no jurisdiction thereafter to enter a decree against appellant, and that the court erred in overruling appellant's motion to dismiss.

The statute applicable to the case at bar is as follows: "An action may be dismissed without prejudice to a future action: First. By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court." Comp. St. 1929, sec. 20-601. The question to be determined, therefore, is whether there had been a final submission of the case to the court before the dismissal of appellant's cause of action.

It appears from the record that each party was granted

five days after the taking of the evidence was completed in which to file briefs. The dismissal was filed prior to the date fixed for filing briefs. In a like case under a statute similar to the Nebraska statute, the supreme court of Ohio has said: "Under our system of jurisprudence, questions of law to be determined by the trial court may be as important, or more so, than questions of fact, and counsel have a right to present their argument on both fact and law either orally or by brief before the trial court arrives at its decision. It is after that has been done that the case can be considered as having been finally submitted to the court. * * * We recognize the fact that this method of procedure may be employed to harass a defendant, and may prolong expensive and annoying litigation. On the other hand, in some cases, it may be employed for the benefit of a plaintiff who finds himself presently unable to go forward with the litigation, and who seeks to preserve his just rights." *State v. Cook*, 124 Ohio St. 478, 79 A. L. R. 684. In the case of *Houston's Adm'r v. Thompson's Adm'r*, 87 Mo. App. 63, in construing a statute similar to the Nebraska statute, the court said: "Our statute is in derogation of the common law by which a plaintiff could take a nonsuit at any time before the jury returned a verdict or a judgment was actually entered by the court when the case was tried without a jury. * * * The right of a plaintiff to take a nonsuit or dismiss the action upon discovery at any stage of the trial that, in the then state of his case, he cannot recover or safely proceed further, is essential to an efficient administration of the law and often enables justice to prevail when otherwise it would miscarry. The most righteous cause is liable to fail now and then from unforeseen contingencies, accidental omissions, a mistake in procedure or other circumstances unconnected with the merits, and but for this rule, substantial rights would be thereby wholly lost. So the wisdom and policy of the common law always freely accorded the privilege to litigants, while statutory limitations of its exercise have usually been restricted by the courts within their exact

terms. The power to allow a dismissal ends under our Code, and most others, when the case is finally submitted for determination, but this is held to have happened so as to defeat the right only when nothing remains to be done to render it complete. 6 Ency. of Pleading & Practice, 840; *Morrisey v. Chicago & N. W. R. Co.*, 80 Ia. 314."

In the case of *Crane v. Leclere*, 204 Ia. 1037, in discussing a similar statute, the supreme court of Iowa said: "If the court had granted time for the attorneys to appear and argue the case orally, certainly there would have been no final submission of the case, and the plaintiff could voluntarily dismiss the same before the arrival of the time fixed. The effect of granting time to file briefs was that the case was not finally submitted for determination by the court until the court could have the briefs for the consideration of the matters before him, or until the expiration of the time granted for the filing of same. A court can determine the merits of a case at any time after its submission; but in the instant case, the court could not have determined the same until the expiration of the time granted for filing of briefs. Therefore, there had not been a final submission of the case to the court for its determination. The cause was only submitted in so far as the taking of evidence was concerned, but was open for what aid the parties could give the court as to the law applicable to the evidence which had been previously received."

We are constrained to agree with the reasoning and holdings in the cases cited. Appellant clearly had the right to dismiss its case without prejudice within the time allowed for filing briefs. "A plaintiff has an absolute right to dismiss his action at any time before the final submission of the cause, subject alone to compliance with conditions precedent, such as the payment of costs, etc., as may be imposed by the court." *Beals, Torrey & Co. v. Western Union Telegraph Co.*, 53 Neb. 601.

Appellees Sedlak further contend that they had pleaded facts which entitled them to affirmative relief and that they could not be deprived thereof by the act of appellant

in dismissing the action without prejudice. The record shows that the appellees Sedlak asked and were granted leave to amend and set up the facts entitling them to affirmative relief after appellant's dismissal was on file. The court had no jurisdiction over the appellant on the cause of action set out in its petition at that time, the same having been dismissed. The cause having been properly dismissed, the court was without power to permit the amendment to the answer subsequent thereto. The state of the pleadings at the time the dismissal was filed was such that the right of appellant to dismiss without leave of court cannot be questioned.

With reference to the cross-petition of appellee Fred Duda, praying for the foreclosure of his second mortgage, there is no question that he could proceed on his cause of action as if the dismissal had not been filed. Comp. St. 1929, sec. 20-603. This court has held: "A plaintiff has the right, before final submission of his cause of action, to dismiss the same, but this right does not control the right of the defendant to proceed to the trial of a set-off or counterclaim properly pleaded by him in his answer." *Adams v. Osgood,* 55 Neb. 766.

That part of the decree of the district court purporting to adjudicate the rights between the appellant and the appellees Sedlak is reversed, with directions to the court below to enter an order of dismissal without prejudice to the right of appellant to institute another action for the same cause against the appellees Sedlak, and that part of the decree finding for appellee Duda on his cross-petition is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

ANNA AMOS, APPELLANT, V. VILLAGE OF BRADSHAW, APPELLEE.

FILED MARCH 8, 1935. No. 29397.

Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY. In a compensation case on trial *de novo*, *held* death of employee from cancer not to have resulted from injury received in course of employment.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Bruce Fullerton, for appellant.

Sanden, Anderson & Gradwohl, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This is a compensation case to be tried *de novo* in this court.

John Amos died as a result of cancer February 6, 1934. The action is brought by his widow. The district court found, in effect, that the cancer did not arise from any injury received in the course of employment.

The pleadings show that John Amos was injured May 10, 1932, in the course of his duties, by falling off an electric light pole; that at such time he was an electrician, city marshal and street and light commissioner of the village of Bradshaw, Nebraska; that his salary as such was $90 a month; that he received medical aid for his injuries, and the stipulation of the parties is that he was paid compensation by the village for two months. The pleadings further show that he returned to work about one month after he was injured; that a year later, complaining of hemorrhoids, he presented himself to a physician who ultimately diagnosed the trouble as cancer and took Amos to a firm of surgeons, Bell & Bell, at York, and that the latter performed an operation, removing the dis-

eased parts, June 26, 1933. The appellant contends that the cancer was caused by injuries received May 10, 1932.

The appellee contends that, since the pleadings agree that the deceased was street and light commissioner, and injured in his occupation as such, no recovery at all can be had. *Suverkrubbe v. Village of Fort Calhoun,* 127 Neb. 472. Citing, also, an almost identical case in the facts, decided by the supreme court commission in *Heine v. Phoenix Indemnity Co.,* No. 27756. Appellee further contends and proves that October 7, 1932, the village paid to Amos $54.60 as final settlement and received his receipt and release therefor; that no one contends that the release was obtained by fraud or mistake, and the same is binding on his dependents—citing *Welton v. Swift & Co.,* 125 Neb. 455; *Bliss v. Woods,* 120 Neb. 790. We prefer to rest our decision, however, on the merits of the case, for we feel that the appellant has failed to establish to any degree of reasonable certainty that the cancer from which Amos died was caused by the injury he received in his occupation. On the other hand, we feel that the evidence preponderates in favor of the appellee in that respect.

With the exception of the testimony of the wife, the record is devoted to testimony by physicians and surgeons. The wife's testimony establishes the fact that Amos was confined to his bed from May 10 to June 18, 1932; that he then returned to work, but was not well; that he passed blood both in urine and from the bowels during confinement; that he continued to suffer in the latter respect and with pain so "he couldn't sit" to the time of his death; that his weight decreased "right along;" that his pain was across the hips and in the rectum; that his buttocks were sore; that Amos was strong and healthy before the accident. It is claimed that, in falling from the electric light pole, Amos fell on his buttocks, but there is no proof to that effect in the record. The testimony is that the cancer was in the sigmoid region of the colon, about four inches from the rectum. The expert for the appellant infers from the foregoing facts that the cancer was caused by

the fall and also that, if a cancerous condition existed, the fall aroused the same to activity. The expert for the appellant never saw the deceased. The two doctors who performed the operation, removing the cancer, testified definitely that particular type of cancer could not be caused or affected by a fall, and that Amos' fall could not have caused any cancer in the sigmoid region of the colon. And another expert, who classifies himself as an authority on cancer, states very positively that this particular type of cancer—epithelial, a carcinoma—is neither produced nor affected by injury or a blow.

From a careful analysis of all the testimony, we are strongly inclined toward the belief that the condition from which Amos died was one not caused by injury sustained by him a year before his operation. The best that can be said is that we are left in serious doubt that this particular type of cancer could be caused or affected by a blow or in any measure have been due to the injury which Amos received. In this view of the situation, the appellant has not established the facts to that degree of certainty which we have required in this jurisdiction. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468; *Huffman v. Great Western Sugar Co.*, 125 Neb. 302. If our conclusion depended upon seeing the witnesses, we would then be confronted with the proposition that the trial court had the better opportunity of weighing the value of their testimony; and since he found for the appellee, he must have accepted the version of appellee's witnesses, rather than that of the one expert for the appellant. *Johnson v. Erickson*, 110 Neb. 511; *Southern Surety Co. v. Parmely*, 121 Neb. 146.

Having reached the foregoing conclusion, it follows that the judgment of the trial court is right and is

AFFIRMED.

NEIL MCNAUGHT, APPELLANT, V. STANDARD OIL COMPANY, APPELLEE.

FILED MARCH 12, 1935. No. 29452.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURIES. "Workmen's compensation law provides compensation for such injuries only as arise out of and in the course of workmen's employment." *Pappas v. Yant Construction Co.*, 121 Neb. 766.
2. ———: ———: ———. Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform service.

APPEAL from the district court for Polk county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

Mayer & Mayer, for appellant.

W. H. Herdman, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

DAY, J.

This is a compensation case. The plaintiff was employed with his truck to sell and deliver gasoline and other petroleum products in a definite territory surrounding Polk. The compensation commissioner made an award, but, upon appeal to the district court, compensation was denied for that the injuries sustained by the plaintiff were not caused by an accident arising out of and in the course of his employment by defendant. This is the only question presented here. If the plaintiff's injury was caused by an accident arising out of and in the course of his employment, it is agreed by the parties that the award of the compensation commissioner is proper.

On January 13, 1934, the plaintiff left Polk with his truck loaded with gasoline and other petroleum products with the intention of making several deliveries. When he found his first customer away from home, he drove to

Stromsburg for the purpose of making a payment of an instalment on the purchase price of his truck. Stromsburg is about four miles outside of the territory in which plaintiff was authorized to sell and deliver merchandise. After making the payment on his truck, the plaintiff drove back toward the home of another customer to make a delivery and, when within about one and one-half miles from the line that marked the limit of his territory, the accident occurred. The defendant contends that the trip to Stromsburg was a deviation from his duty and that an injury caused by an accident on this trip was not one arising out of and in the course of his employment.

"Workmen's compensation law provides compensation for such injuries only as arise out of and in the course of workmen's employment." *Pappas v. Yant Construction Co.*, 121 Neb. 766. See *Bergantzel v. Union Transfer Co.*, 124 Neb. 200; *Siedlik v. Swift & Co.*, 122 Neb. 99; *Feda v. Cudahy Packing Co.*, 102 Neb. 110. Pappas was engaged in the repair of his truck which he used in the employment, at home, on a day he was not working. He was injured, and this court denied compensation. Bergantzel and Siedlik were injured on their way to the premises of the employer before starting upon the day's work. Feda was injured during working hours, but while engaged in playing and scuffling with another employee in a dangerous position around the elevator.

The plaintiff was employed upon the day of the accident when he loaded his truck with merchandise and started to make deliveries. But the employer challenges his status, from the time he left the territory in which he was authorized to work, on the trip to Stromsburg. On the other hand, the employee insists that the trip to Stromsburg to pay an instalment of the purchase price of the truck was an incident of his employment. In *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, the employee was injured during the noon hour on the employer's premises grinding a chisel which he used in his work. This was held to be incidental to his employment. In *Speas v. Boone County,*

119 Neb. 58, the employee furnished his own team for work on a public road. Ordinarily, he fed the team on the road, but on the day of the accident his work was near his home, and he put them in the barn to feed them. During the noon hour, while caring for the horses, one of them kicked him, injuring him. Under the facts and circumstances of that case, caring for the team during the noon hour was held to be incidental to his employment.

However, another provision of the workmen's compensation act defines its terms. Section 48-152, Comp. St. 1929, says: " 'Personal injuries arising out of and in the course of employment,' it is hereby declared: *Not* to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." The plaintiff in this case, at the time of the accident, was not engaged in, on or about the premises where his duties were being performed, or where his service required his presence as a part of such service, unless the payment on the truck was a duty incidental to his employment. The plaintiff furnished the truck, but the tank and rack were the property of the defendant. It was necessary for the payments to be made on the truck for the plaintiff to continue his employment. The same was true in *Pappas v. Yant Construction Co.*, 121 Neb. 766. It was as necessary that Pappas' truck be repaired as that McNaught's truck have an instalment on the purchase price paid. There is no suggestion in the record that the employer here was interested in the matter. Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform service.

At the time of the accident, the plaintiff was returning from Stromsburg and was one and one-half miles east of

the territory in which he was authorized to work. He relies upon *Keebler v. Harris*, 120 Neb. 739, to sustain his contention that, even if the trip to Stromsburg was not incidental to his employment, at the time of the accident, his private purpose had been fulfilled, and he was on his way back to the place where his employment required him to be. In the *Keebler* case, Harris, an employee of the American Credit Corporation, drove his employer's car into a collision with plaintiff. Harris had general authority to collect delinquent payments and to repossess cars. He repossessed a car and drove it to make a collection, then deviated from his course for personal pleasure. At the time of the accident, he was on his way back to the garage where it was his duty to deliver the car. He was not on a direct route from his last duty in his employment to the garage. It was there said: "He kept within the zone of his general duties. If he deviated from the direct route and temporarily abandoned his employment for his own pleasure, the evidence tends to prove that he resumed those duties when he started to the storage garage and that the accident occurred on the way." At the time of the accident, Harris was doing the specific thing he was ordered to do.

This plaintiff was not within the zone of his general duties. Anyhow, the *Keebler* case was a common-law action, brought by a third party, and not a compensation case. To recover under the workmen's compensation law, one must be within its provisions. The plaintiff was not within its terms.

AFFIRMED.

PAINE, J., dissenting.

It may be admitted that this case is very close to the line. The majority of the members of the court hold that the Standard Oil Company is not responsible under the workmen's compensation law for the injury to Neil McNaught, its employee. In my opinion the compensation commissioner was right in finding that, under the facts

and the law, the said company should pay the hospital bills and weekly award for the injury caused its employee when his truck upset. McNaught was required by his contract of employment to furnish a truck, but the company furnished the tank and the racks upon this truck. McNaught earned about $75 a month. The truck was filled with company gas, oil, and other products before he started out on his regular trip, but, finding that a customer was away from home, he drove the truck some four miles to Stromsburg to make his regular payment due on the purchase price of the truck. As soon as the payment was made he started directly back to see another customer, and when within a mile and a half of his territory his truck upset, and he was badly injured.

In *Struve v. City of Fremont,* 125 Neb. 463, being a workmen's compensation case, it was held that, when a city fire chief, who used his own car, the city paying for the gas and oil therefor, while working on such car early in the morning, preparing to drive down to the fire station, was a victim of monoxide gas poisoning in his own garage, the city was responsible for his death, under the theory that his death occurred within the scope and course of his employment.

In *Geraty v. National Ice Co.,* 16 App. Div. (N. Y.) 174, a cake of ice fell out of an ice-wagon and injured a passer-by while a driver had temporarily driven on a side street on his own business. It was held generally that, if a servant makes a deviation from his route for his own purposes, and the master's liability has been suspended while the servant has deviated from the route, such liability again attaches after he has resumed the prosecution of his master's business.

In *Riley v. Standard Oil Co.,* 231 N. Y. 301, 22 A. L. R. 1382, a truck driver was sent to a freight yard for goods. After obtaining them he went four blocks in the opposite direction upon an errand of his own. Having accomplished his errand, he started to return to the freight yard, but before he had reached the point where he had deviated

from his master's business he injured a child. Judge Andrews, in an opinion concurred in by Judge Cardozo, held that he was driving toward his master's mill with the truck loaded with the master's goods, his only purpose being to deliver such goods as his master had commanded, with no independent object of his own in his mind, and it was held that the relation of master and servant existed. Each of these statements applies as well to the case at bar.

Our court has already held that it is not necessary for one to have reached the zone of his employment, or the territory in which he was employed to work. It was so held in *Keebler v. Harris,* 120 Neb. 739, where a young man's duty was to repossess an automobile and return it to his employer's garage, but he deviated 25 blocks on a side trip for his own pleasure; then, when he started back to the garage with the car, he had a collision, and it was held that he was then engaged in his master's business, even though he was not yet as close to the garage as he was when he deviated on his personal errand; Judge Rose rightly holding that he resumed his master's business when he started to return.

In the case of *Speas v. Boone County,* 119 Neb. 58, a workmen's compensation case, Speas was engaged in dragging roads for Boone county, for which he was paid $7.50 a day when he furnished four horses. On the day of the accident he was dragging the road along by his own farm, and at 11:30 a. m., having reached the driveway into his own farmyard, he turned in, unhitched, and the four horses entered the barn, and in going in to tie them, one of these four horses, which had theretofore been gentle, kicked him. In this opinion Chief Justice Goss said: "Speas was paid by the county for the use of the team. It was the duty of Speas to feed the team. It was implied in his contract of employment that he would feed them at noon. It was as important to feed them in preparation for the afternoon's work as it was necessary for Tragas to have a sharp chisel for the purpose of cleaning out the pans on which he was working during regular

working hours. Tragas could have sharpened the chisel during the hours for which he was paid instead of taking a portion of his hour for rest or refreshment thus to further his employer's business. Speas could not both feed the team and eat his own lunch while the team was working." The case referred to is *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, in which an injury was sustained while grinding a chisel during the noon hour to use when he again went back on duty.

In *Perry v. Johnson Fruit Co.*, 123 Neb. 558, a traveling man furnished his own car, and while taping up a leaking gasoline line and filling the vacuum tank, early in the morning at his own home, preparatory to making a trip for his employer, he was fatally burned. It was held that, under the principles announced in *Speas v. Boone County, supra,* his dependent was entitled to compensation. This repair work was no more the master's business than was McNaught's trip to make the payment due on his truck.

The statement in this second syllabus, that the relation of employer and employee does not exist until he returns to the place where by the terms of his employment he is required to perform service, is clearly against the holding of this court in *Keebler v. Harris, supra,* where he had only just started back from his pleasure trip, and was not as close to his point of deviation as McNaught was in the instant case.

An abundance of cases support the doctrine that, when the employee is on his way back from a private errand to carry out instructions given by his employer, the former relationship is restored. *Gibson v. Dupree,* 26 Colo. App. 324; *McKiernan v. Lehmaier,* 85 Conn. 111; *Ritchie v. Waller,* 63 Conn. 155, 27 L. R. A. 161, 38 Am. St. Rep. 361; *Leilich v. Chevrolet Motor Co.*, 328 Mo. 112; Ann. 22 A. L. R. 1409; 26 Cyc. 1536.

In the second paragraph of the syllabus in the case at bar, it is held that making a payment on the purchase price of the truck which his contract of employment required him to furnish was not incidental to his employment. I

insist that it was, for if a man, in doing a road-dragging job (*Speas v. Boone County, supra,*) which requires the use of four horses, can be allowed workmen's compensation when he is kicked by one of those horses in his own barn, on the theory that it is incidental to his employment to feed the horses or else they cannot work after dinner, it forms a clear precedent for McNaught in the instant case, who must furnish a truck, and is injured one and a half miles out of his territory while making a payment which is required to be made to keep possession of the truck, which he is required to use in his master's business; the cases are without distinction, and to be consistent, and follow its own precedent, this court should allow McNaught compensation.

HENRY J. STARK, APPELLANT, V. LEVINUS M. STARK, ADMINISTRATOR, ET AL., APPELLEES: LEVINUS M. STARK ET AL., APPELLANTS.

FILED MARCH 12, 1935. No. 29112.

1. **Evidence**: ADVANCEMENTS: PAROL EVIDENCE. Under section 30-115, Comp. St. 1929, providing "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant," parol evidence is inadmissible to prove an advancement, all other evidence than that prescribed being excluded by implication.
2. **Statutes**: CONSTRUCTION. "As a general rule, when a state adopts a statute from another state, it also adopts the construction which has been previously placed upon it by the courts of the state from which taken." *Gentry v. Bearss*, 82 Neb. 787. See *Pomeroy v. Pomeroy*, 93 Wis. 262.

APPEAL from the district court for Saline County: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

John J. Ledwith and *Herman Ginsburg*, for appellants.

Robert R. Hastings, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

After decree of partition and sale of certain real estate in the district court for Saline county, Nebraska, a motion was filed by Henry J. Stark, plaintiff, and Levinus M. Stark, a defendant, both appellants in this court, for distribution of the proceeds of such sale, in which motion they set forth that, by oral agreements with their father during his lifetime, defendants Emil A. Stark, Julia O. Harter and Ruth B. Spohn, appellees in this court, had been advanced certain sums against their respective interests in the estate of their father by the conveyance of certain tracts of land to each of them; that certain sums respectively should be deducted from the shares of each from the proceeds of the real estate sold in partition and then in the hands of the referee. This motion was put in issue by a counter showing, and hearing was had by the court, wherein certain evidence was adduced by the appellants and an offer made by them to show by parol evidence that the deeds, absolute upon their faces, were given by way of advancements, to which objection was made and sustained by the court. Whereupon, the trial court found generally against appellants in that the deeds to appellees were absolute deeds of conveyance and not by way of advancements.

The sole question for our determination is whether appellants should have been allowed to introduce parol evidence in an endeavor to prove that the deeds of conveyance, absolute upon their faces and containing nothing indicating an advancement, were, in effect, advancements. The answer to this question will be found in the construction of section 30-115, Comp. St. 1929, which reads as follows: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant."

The doctrine of advancements is of statutory origin (statute of 22 & 23 Charles II, ch. 10), being unknown to the common law. Statutes providing that, in order to constitute an advancement, the conveyance of the gift or grant shall so express or the donors so charge in writing, or the gift be acknowledged in writing by the donee, or provision similar in effect, exist in, and have been interpreted by, many states. Where the law provides in what manner and by what evidence advancements shall be established, the mode so pointed out must self-evidently be pursued. Under these statutes such evidence and no other can be introduced, and an advancement not evidenced in the manner recognized by statute is, in legal effect, no advancement at all, however clearly it was intended. 3 Woerner, American Law of Administration (3d ed.) 1892, secs. 558, 559, and notes. See, also, 18 C. J. 912. "In some jurisdictions an advancement must be made in writing, and the writing must contain within itself the necessary evidence of the intention of the donor in order to constitute an advancement. In these jurisdictions parol declarations, whether made subsequent or prior to the alleged advancement, are not admissible to establish the fact of advancement." 1 R. C. L. 667, sec. 20. "In some jurisdictions it is provided by statute that no gift or grant shall be deemed to have been made as an advancement unless expressed or charged as such in writing by the donor or acknowledged as such in writing by the donee. The effect of such statutes is not only to necessitate the exclusion of parol evidence to show an advancement, but also to require the courts to hold that an advancement not in writing is, in legal effect, no advancement at all, unless the heirs and distributees waive the statutory requirement." 18 C. J. 919. Dame, Probate and Administration (3d ed.) 530, sec. 524, a well-known Nebraska authority, says: "Oral evidence is inadmissible to prove that payments by a donor were intended by him to be treated as advancements, and the doctrine of advancement by presumption does not prevail in this state. Payments of

money or other valuable property to a child, or conveyances of real estate, unless otherwise expressed in the consideration, or explained by competent evidence, are presumed to be gifts and not advancements. To constitute a payment or conveyance or delivery of property an advancement, there must have been an intent on the part of the donor to so consider it, though it is not necessary that such intent be known to the donee or concurred in by him, and such intent must be shown by written evidence, either the grant itself, charges entered by the donor, or the receipt of the donee."

This court has heretofore passed squarely upon the question. In *Boden v. Mier*, 71 Neb. 191, the court said: "Section 34, chapter 23, Compiled Statutes, provides: 'All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant.' In an action to adjust advancements, *held*, that oral testimony is incompetent to prove the advancements." In the opinion at page 197 the court said: "But, while the three notes (ordinary promissory notes) are frequently referred to in the argument as advancements, there is no competent evidence in the record that they or any of them were in fact such. In order that a gift or grant shall be deemed an advancement, it must be expressed in the gift or grant to be so made, charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. Section 34, chapter 23, Compiled Statutes (Annotated Statutes, 4934). That section by implication excludes parol evidence of an advancement. *Pomeroy v. Pomeroy*, 93 Wis. 262; *Bulkeley v. Noble*, 2 Pick. (Mass.) 337; *Bullard v. Bullard*, 5 Pick. (Mass.) 527; *Barton v. Rice*, 22 Pick. (Mass.) 508. The evidence relied upon in this case as showing that the notes, or any of them, were intended as advancements is exclusively parol, and, as we have seen, wholly incompetent for that purpose." See, also, *Riddell*

v. Riddell, 70 Neb. 472; *Lodge v. Fitch,* 72 Neb. 652; *In re Estate of Hessler,* 79 Neb. 691; *Carr v. Carr,* 102 Neb. 158; *Johnson v. Ghost,* 11 Neb. 414.

In *Boden v. Mier, supra,* this court cited and followed the Massachusetts, Michigan and Wisconsin cases. It is interesting to note that the statutes of these states, with reference to this section, are identical with our own. Massachusetts adopted this section in 1805 and has since construed it many times with reference to the question presented to us in this case. As early as 1824, in *Bulkeley v. Noble,* 2 Pick. (Mass.) 337, the court said: "With respect to the parol evidence offered to prove an advancement to two other children, we think it perfectly clear, that in rejecting it the judge of probate acted in conformity with the statute, which by implication excludes all such evidence; and in those two cases there was no written evidence." The Massachusetts court has since consistently held that an advancement, whether of real or personal property, made by an intestate to his child or other descendant, must be proved by the evidence prescribed by their statutes and by no other, and that oral testimony is clearly inadmissible to prove an advancement which must be proved in the manner prescribed in that section. See, also, *Ashley, Appellant,* 4 Pick. (Mass.) 21; *Osgood v. Breed's Heirs,* 17 Mass. 356; *Bullard v. Bullard,* 5 Pick. (Mass.) 527; *Barton v. Rice,* 22 Pick. (Mass.) 508; *Bigelow v. Poole,* 10 Gray (Mass.) 104; *Cummings v. Bramhall,* 120 Mass. 552.

In *Pomeroy v. Pomeroy,* 93 Wis. 262, the first opinion construing the Wisconsin statute passed in 1849, exactly in point here, the court said: "Several errors are assigned, but the only one requiring consideration on the record, and the only one seriously insisted upon, as we understand it, is one involving the question of whether the court erred in rejecting the offer of parol evidence to prove that land conveyed to plaintiff during the lifetime of the father was so conveyed by way of advancement." The Wisconsin statute is identical with ours, and after quoting the same in full the court said:

"Such statute existed in Massachusetts as early as 1805, and without material change it has ever since been the law of that state. It first received judicial construction there in *Bulkeley v. Noble,* 2 Pick. 337, decided in 1824, where Parker, C. J., delivering the opinion of the court, said, in effect, it is perfectly clear that the trial judge, in rejecting parol evidence offered to prove an advancement, acted in conformity with the statute. This was followed in *Ashley, Appellant,* 4 Pick. 21, decided in 1826, where the court said: 'We are bound by the statute of 1805, and therefore can consider nothing as an advancement unless proved in the manner therein prescribed.' This was subsequently followed in *Bullard v. Bullard,* 5 Pick. 527, decided in 1827, and again in *Barton v. Rice,* 22 Pick. 508, decided in 1839, and has never been departed from by the courts of that state.

"Counsel contends that the statute says, in effect, that advancements may be proved in the manner indicated; that it does not exclude other proof; therefore, other proof may be resorted to (the contention made in the case at bar). The precise point was under consideration in the Massachusetts case of *Bulkeley v. Noble, supra,* where the court said, referring to the parol evidence: 'The statute, by implication, excludes all such evidence;' and again, in *Barton v. Rice, supra,* where Wilde, J., delivering the opinion, said: 'Oral testimony is clearly inadmissible to prove an advancement, which must be proved in the manner prescribed in the Revised Statutes, ch. 61, sec. 9. That provides, "that all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." The statute does not expressly declare that an advancement shall not be proved in any other manner, but that undoubtedly is the meaning of the statute.' Such was the construction of the statute by the Massachusetts court in 1838, at which time it was adopted without change by the

state of Michigan, where it became sec. 9, ch. 1, tit. 2, pt. 2, R. S. 1838. No different construction was given to it there (see *Power v. Power's Estate*, 91 Mich. 587; *Olney v. Brown*, 163 Mich. 125), and in 1849 it was adopted here, and became sec. 8, ch. 63, R. S. 1849." See, also, *Ludington v. Patton*, 121 Wis. 649; *Schmidt v. Schmidt's Estate*, 123 Wis. 295; *Arthur v. Arthur*, 143 Wis. 126; *Estate of Fontaine*, 181 Wis. 407. See 26 A. L. R. 1164, note.

Our statute was passed in 1866, long after the same statute was adopted and construed by, first, Massachusetts, then Michigan, then Wisconsin. We have seen fit to follow these decisions in the construction of our statute, and, rightly so, because it is a familiar rule that, where a statute has been adopted from another state, ordinarily the construction given previous to its adoption by the courts of that state will be followed in the adopting state. *Goble v. Simeral*, 67 Neb. 276; *Zabriskie v. Greater America Exposition Co.*, 67 Neb. 581 (see note page 584); *Gentry v. Bearss*, 82 Neb. 787; *State v. Martin*, 87 Neb. 529; *Mayfield v. North River Ins. Co.*, 122 Neb. 63.

We have carefully considered the authorities relied upon by appellants, but find that they are from states having statutory provisions different from our own, or that they could as well be cited as upholding the contention of the appellees. We are content to abide by the Massachusetts, Michigan and Wisconsin rule already adopted by this court in *Boden v. Mier, supra*, as a proper construction of this statute.

The trial court, therefore, was correct in its ruling that parol evidence was inadmissible to prove that the deeds, absolute upon their faces, were given by way of advancements. The judgment of the district court is

AFFIRMED.

EMILE REGOUBY, APPELLANT, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLEE.

FILED MARCH 12, 1935. No. 29413.

Appeal: REMAND. "When a judgment of the district court is reversed and a cause remanded with specific directions, it is the duty of the district court to follow the mandate." *Jobst v. Hayden Bros.*, 88 Neb. 469; *State v. Farrington*, 86 Neb. 653.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Reversed, with directions.*

Frank M. Johnson and *Craft, Edgerton & Fraizer*, for appellant.

Cook & Cook, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

This is an equity case heretofore tried *de novo* by this court. The opinion appears at 126 Neb. 711. The mandate of this court, dated May 9, 1934, provides: "This cause coming on to be heard upon appeal from the district court of Dawson county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court in refusing the injunction, but does find error apparent in misapplying proper rules of damages. It is, therefore, considered, ordered and adjudged that that part of the judgment of said district court denying the injunction be, and the same hereby is, affirmed, and in all other respects said judgment is reversed and the cause is remanded with instructions to compute the damages in accordance with the opinion of this court this day filed herein."

Quoting from the opinion, this court said:

"The trial court denied plaintiff any damage occasioned to his crop by the overflow of his land, covering it with silt and débris, and also denied him damages for the

erosion caused by the breaking over of the canal embankment. The trial court should have allowed plaintiff damages such as were fairly and justly warranted by the evidence, as follows: The value of the land actually taken by the canal, and borrowed earth used in the reparation thereof; special damages to the remainder of the tract occasioned by the project that could have been properly anticipated, such as inconvenience in husbandry, moving of fences, drainage of ponds and sloughs, and the like, and from this item there should have been deducted whatever amount such damages were lessened by the building of bridges and the construction of fences. No offset against plaintiff's special damages should have been allowed for general benefits to the land in question which are enjoyed by all the irrigable land tributary to the canal. In addition to the above, any resultant damage occasioned by the negligence of the defendant in the construction of its canal, such as overflowing and flooding of plaintiff's land, which cannot be reasonably anticipated in the allowance of special damages. From this item there should be deducted whatever amount the defendant has minimized the same by repairing flood damage to plaintiff's residence. The trial court was correct in refusing the injunction, but committed error in misapplying proper rules of damages.

"That part of the decree denying the injunction is affirmed, but in all other respects the same is reversed and the cause remanded, with instructions to compute the damages in accordance herewith." *Regouby v. Dawson County Irrigation Co.*, 126 Neb. 711.

Plaintiff, appellant, immediately upon return and filing of the mandate, filed a motion for judgment on the mandate. At the hearing thereon, the trial court made the following statement in the record: "Since the supreme court seems to be confused in the facts in this case, as to what actually occurred, the court is going to permit both plaintiff and defendant to introduce any additional testimony as to the damages or anything else involved in this case which will be helpful to this court and to the supreme

court." Over plaintiff's objection throughout the record, additional testimony was taken by the court, at the conclusion of which the court entered judgment as follows:

"And now on this 19th day of July, 1934, the same being a day of the regular May, 1934, term of the district court of Dawson county, Nebraska, Honorable I. J. Nisley presiding, this cause came on to be heard upon the motion of the plaintiff for judgment on the mandate. Said motion is duly argued to the court by both the plaintiff and defendant and, upon consideration thereof, the court finds that the same should be overruled.

"It is therefore ordered that plaintiff's motion for judgment on the mandate be and the same is hereby overruled, to which ruling the plaintiff excepts.

"And now on this same day, said cause came on for trial, evidence was received on behalf of the defendant and the plaintiff, both sides rest and said cause is taken under advisement by the court.

"And now on this 20th day of July, 1934, said cause having been taken under advisement, the same now comes on for determination upon the pleadings and the evidence. Upon consideration whereof, the court finds that the value of the land taken by the appropriation, borrowed dirt used by the defendant in repairing a break, special damages to the remainder of plaintiff's land occasioned by the building of the irrigation project, and damages sustained by the plaintiff by reason of the washout or gulch in plaintiff's land are in the total amount of $325, and that the plaintiff should have judgment against the defendant for said amount."

Motion for new trial was overruled, and plaintiff again brings the case to this court.

It appears that there are but two questions for our consideration: (1) Should the trial court have obeyed the mandate of this court and entered judgment for appellant as directed? (2) The amount of appellant's damages. The first question must be determined by the mandate of this court upon the former appeal. It is a well-known

rule of law that, when a case is sent back by the supreme court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein. *Story v. Robertson*, 5 Neb. (Unof.) 404; *State v. Sheldon*, 26 Neb. 151; *Oliver v. Lansing*, 51 Neb. 818; *Farmers & Merchants Bank v. German Nat. Bank*, 59 Neb. 229; *State v. Dickinson*, 63 Neb. 869; *State v. Thompson*, 69 Neb. 157; *Gadsden v. Thrush*, 72 Neb. 1; *Gund v. Ballard*, 80 Neb. 385; *State v. Farrington*, 86 Neb. 653; *Kerr v. McCreary*, 86 Neb. 786; *Jobst v. Hayden Bros.*, 88 Neb. 469; *Bliss v. Live Stock Nat. Bank*, 124 Neb. 880; 9 Bancroft, Code Practice and Remedies, 9787, sec. 7440, and notes.

There had been no change in the circumstances. No new question presented itself. No new reason appeared which would require a further hearing to do justice and equity between the parties. The record was complete. The case had been fully tried in the district court, and tried *de novo* in this court. The trial court, upon the record before it made at the previous trial, should have computed the amount of plaintiff's damages as directed by this court, entered judgment therefor, and ended the litigation, instead of granting the defendant a new trial.

The judgment given plaintiff by the trial court is wholly inadequate and contrary to the evidence and the mandate of this court.

The judgment is reversed and the cause is remanded, with directions that the trial court enter judgment for plaintiff, appellant herein, in the sum of $1,400, with interest from December 16, 1932, and that defendant pay all costs.

REVERSED.

VERNON WAGNER, ADMINISTRATOR, APPELLEE, V. WATSON BROTHERS TRANSFER COMPANY, APPELLANT.

FILED MARCH 12, 1935. No. 29156.

1. **Negligence** is not actionable unless it be the proximate cause of the injury to the complaining party.
2. **Trial: INSTRUCTIONS: NEGLIGENCE: PROXIMATE CAUSE.** In an action against the driver of a motor vehicle founded upon the negligent operation thereof, the doctrine of proximate cause, when the pleadings and the evidence make the same applicable, is a necessary issue of fact to be submitted to the jury.
3. ———: ———. It becomes the duty of the trial court to submit to the jury the necessary issues of fact presented by the pleadings and the evidence, whether requested or not, and a failure to do so constitutes error.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

Rosewater, Mecham, Shackelford & Stoehr and *Tyler & Peterson,* for appellant.

John C. Mullen and *J. H. Falloon, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

CHASE, District Judge.

This is an action brought by the administrator of the estate of Otis Wagner to recover damages for his wrongful death. The testimony shows that on the night of March 24, 1933, a Ford automobile driven by one Jake Sailors, in which the plaintiff's deceased was riding, collided with a truck owned by the defendant and driven by one of its servants. The collision occurred on Highway No. 73 about nine miles west of Falls City, Nebraska. The case was tried to a jury resulting in a verdict for $4,000 for the plaintiff. The trial court required the plaintiff to remit $278 and rendered judgment for the sum of $3,722. From the order overruling the motion for new trial, the defendant has brought the case here for review.

Several assignments of error are relied upon for re-

versal. The principal complaint is that the trial court failed to define "proximate cause" and instruct the jury upon its own motion as to that issue. Another is that the trial court refused a proffered instruction on behalf of defendant which presented that issue in connection with contributory negligence. These two propositions are so closely related that they may be discussed as one.

By resort to the pleadings, it appears that the plaintiff in his petition, after alleging the facts as to how the accident occurred, states that the wrongful, careless and negligent acts of the defendant, its agents and servants were the sole and exclusive cause of the death of said Otis Wagner. The defendant answered traversing the allegations of negligence contained in the petition, and pleading further that the negligence of the driver of the automobile in which the deceased was riding was the proximate cause of the decedent's injury.

The record discloses that there is ample evidence supporting the allegations of the petition and also the allegations of the answer to justify the court in submitting that issue of fact to the jury, which issue was, by the pleadings and the evidence, made one of the principal issues for their determination. Nowhere in the instructions did the trial court either define the term "proximate cause" or submit that question in any form to the jury.

It is a well-settled rule that the negligence of one person cannot be the basis of an action for damages resulting to another unless it be shown that such negligence was the proximate cause of the injury to the damaged party. "Unless the injury received by plaintiff was a natural and probable consequence of the negligence of defendant with no intermediate causal agency, there can be no liability. *Kitchen v. Carter*, 47 Neb. 776." *Merkouras v. Chicago, B. & Q. R. Co.*, 104 Neb. 491. The courts are so uniformly in accord that the doctrine of proximate cause is a necessary ingredient of an action to recover damages for an injury to one party founded upon the negligence of another that it is useless to devote further time to the discussions thereof.

This court has held on numerous occasions that it becomes the duty of the trial court to instruct the jury upon the law of the case when made applicable by the pleadings and the evidence. *Hauber v. Leibold,* 76 Neb. 706; *Aultman & Co. v. Martin,* 37 Neb. 826; *Sandwich Mfg. Co. v. Shiley,* 15 Neb. 109; *Blue Valley State Bank v. Milburn,* 120 Neb. 421. Clearly, it is one of the many functions of the trial court to present to the jury as clear and intelligent an understanding of the material issues presented by the pleadings and the evidence as lies within its power. The trial court, not having defined proximate cause, deprived the jury of an opportunity of considering that doctrine as one of the material issues of fact.

Complaint also is made that the trial court refused a proffered instruction on the part of the defendant. This instruction did not embody any definition as to the meaning of the term proximate cause. It merely told the jury that, if they found the conduct of Jake Sailors while operating the automobile was the proximate cause of the death of Otis Wagner, they must find for the defendant. The giving of this instruction could not have cured the error committed by the trial court in failing to tell the jury the meaning of the term proximate cause.

In view of the foregoing, we must conclude that the trial court did not instruct the jury as to the law of the case, and that such failure constituted error. For obvious reasons, it becomes unnecessary to discuss other propositions relied upon for reversal. The judgment is, therefore,

REVERSED.

JOHN W. BAXTER, APPELLEE, V. NATIONAL MORTGAGE LOAN COMPANY, APPELLANT.

FILED MARCH 16, 1935. No. 29132.

1. **Limitation of Actions: PLEADING: PROOF.** In this state the statute of limitations is a statute of repose; it prevents recovery

on stale demands. If the petition in an action sets forth facts which show upon its face that it is barred by statute, and in avoidance thereof further facts are alleged to remove the bar of the statute, all of which are positively denied by the answer, together with the added allegations that the cause of action is barred by the statute of limitations, the plaintiff cannot recover without first establishing the facts so alleged in avoidance.

2. **Equity**: LACHES: PLEADING: PROOF. Where the petition of a plaintiff who has slumbered long upon his rights shows apparent laches on its face, the suitor must generally account for and excuse his delay by proper allegations in his pleading, and must support such allegations by proof.
3. ———: ———: ———: ———. When suit is brought within the time fixed by the analogous statute of limitations, the burden is on the defendant to show the existence of circumstances amounting to laches. When the suit is brought after the statutory time, plaintiff must plead and prove that laches does not exist.
4. **Principal and Agent.** When the principal is informed of what has been done by his agent, he must dissent, and give notice of it within a reasonable time; and if he does not, his assent and ratification will be presumed.
5. **Trial**: EVIDENCE. Evidence admitted without express reservations limiting it to a particular purpose may be considered for any purpose for which it is relevant and competent.
6. **Principal and Agent.** Where a borrower leaves the proceeds of a loan to his credit with the lender and authorizes the borrower's agent to receive, withdraw and disburse the proceeds of such loan, the responsibility of the lender ends with the withdrawal of such proceeds by the agent. The lender is not required to see that such funds are properly applied or accounted for by such agent, nor is he responsible for the agent's fraud or peculation, in the absence of knowledge of facts putting him on inquiry.
7. **Notice.** One is charged with knowledge of all facts where he is advised of facts sufficient to put an ordinarily prudent person on inquiry, and where, had inquiry been made, he would have had the actual knowledge of such facts.
8. **Evidence** examined, and *held* to fairy establish that plaintiff was guilty of laches in the transaction in suit to such a degree as to preclude recovery by him.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

John C. Hartigan and *Peterson & Devoe,* for appellant.

Stewart, Stewart & Whitworth, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and ELDRED and LIVINGSTON, District Judges.

EBERLY, J.

This is an appeal by the National Mortgage Loan Company, defendant in the district court for Lancaster county (and herein designated as "defendant" or "loan company"), from a judgment entered therein in favor of plaintiff, John W. Baxter, for the sum of $72,620.24. The procedure below was an action in equity, and the cause is here for trial *de novo.*

In summarizing the allegations of the pleadings, it may be said that plaintiff's petition sets forth that the defendant on or about June 1, 1924, by fraud, secured the execution and delivery of a note for $55,000, secured by a real estate mortgage covering 4,000 acres owned by plaintiff in Pawnee county, Nebraska; that at said time plaintiff was fraudulently induced to sign the note and mortgage in blank, with authority to defendant to fill out the same in an amount not in excess of $9,000; that, in violation of such instruction, the note and mortgage securing the same were filled out by defendant in the sum of $55,000, which money was not received by plaintiff, and which note and mortgage were void; that on or about April 1, 1925, by falsely and fraudulently representing to the Federal Trust Company that plaintiff was indebted to defendant in the sum of $55,000 on the note and mortgage aforesaid, defendant caused such Federal Trust Company to pay to it from the proceeds of a loan made by such trust company on plaintiff's land more than $55,000 "in purported payment of the aforesaid note and mortgage and defendant has refused to account to plaintiff therefor;" and, further, that "defendant in the aforesaid transaction was represented by its secretary, one R. F. Ireland, and plaintiff dealt with said Ireland as an officer and representative of defendant."

The present action was commenced on June 24, 1932, but in the fifth paragraph of plaintiff's petition the following is alleged: "During all of the aforesaid time and until 1931, plaintiff was a resident of Connecticut and New York and was not in Nebraska except on a few occasions for short times, and on such occasions he was not in Pawnee county, Nebraska. Plaintiff at all times herein mentioned has been inexperienced in business matters and has been in poor health. Plaintiff did not discover the facts alleged in paragraphs 3 and 4 hereof and the aforesaid fraud of defendant or any evidence thereof until a short time before the filing of this action."

Defendant's answer contained the following: "1st. Alleges that the present cause of action of the plaintiff is barred by the statute of limitations. 2d. That the plaintiff has been guilty of gross laches and negligence in the assertion of his pretended claim and by reason thereof has no cause of action. 3d. The defendant denies each and every allegation in said petition contained."

By the fourth, fifth and sixth paragraphs of such answer it was alleged that the plaintiff employed Rolland F. Ireland "as his attorney-in-fact and as an attorney-at-law to represent the plaintiff in" obtaining "money by mortgage on the lands described in plaintiff's petition and other lands;" that pursuant to such employment by plaintiff there was obtained from defendant $55,000 on the mortgage signed by him on the lands described in plaintiff's petition, which was delivered to plaintiff, and that plaintiff had full notice and knowledge of the said mortgage in the fall of 1924, and fully approved and acquiesced in the same by himself and his authorized agent, received the proceeds thereof, and is estopped to deny same.

To this answer plaintiff filed a reply in the nature of a general denial.

Though the transcript fails to disclose that the plaintiff in any manner challenged the sufficiency of the answer in the trial court, it is now contended that the defendant has failed to properly plead the facts claimed to show that the

cause of action was barred by the statute of limitations, and that mere conclusions are insufficient; that likewise the defendant failed to plead the facts claimed to show laches, and that mere conclusion is insufficient. In a proper case the rule contended for by plaintiff may be conceded. Thus, in *Pinkham v. Pinkham,* 61 Neb. 336, cited by plaintiff, this court announced the rule: "A reply alleging that the defendant's counterclaim did not accrue within the period provided by law for asserting such claim, and containing no facts from which the conclusion is deduced, tenders no issue and such allegation may be entirely disregarded."

However, it seems that in view of the doctrine announced in *Scott v. De Graw,* 90 Neb. 274, in the light of the facts presented by the present record, the principle announced in the *Pinkham* case is not controlling. In the instant case the first four paragraphs of plaintiff's petition set forth a cause of action which accrued, if at all, "on or about April 1, 1925." In this condition the petition obviously failed to state a cause of action at the time it was filed on June 24, 1932, and it was essential for this purpose that there be added thereto allegations of fact which would show affirmatively that the statute of limitations had not run. Evidently for this purpose the pleader added to his petition paragraph 5, already quoted. By the general denial defendant took issue with the facts alleged in this paragraph, and to this he added the allegation covering the defense of the statute of limitations. While the sufficiency of the latter standing alone might be subject to challenge in connection with the issue formed by the general denial, it seems invulnerable to the attack now made.

In *Scott v. De Graw, supra,* we find an action on a note due December 11, 1901. The controlling fact was an indorsement of a payment of $6 thereon alleged to have been made on February 7, 1905. The action was begun on December 31, 1909. The allegation of payment was denied in the answer with the allegation that the action was barred. This court, in an opinion by Sedgwick, J., an-

nounced the rule, viz.: "In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action upon a promissory note sets out the note which shows upon its face that it is barred by the statute, and partial payments are also alleged in the petition which would remove the bar of the statute, and such payments are denied in the answer, with the allegation that the note is barred, the plaintiff cannot recover without evidence of such payments."

Unless the case last cited is now to be overruled, the fundamental reasoning approved therein is controlling on the question of the proper pleading of the statute of limitations in the instant case.

By parity of reasoning the question of the sufficiency of the pleading of the defense of laches must be resolved against the contention of the appellee. Paragraph 5 of his petition, in legal effect, performs a double function. So far as pleading is concerned, it tolls the statute of limitations, and, in addition, alleges facts which, if established by sufficient proof, excuse the pleader's laches. This pleading was thus necessary and proper. As already set forth, the transaction upon which plaintiff's demand was based occurred on or before May, 1924. This action was not commenced until June 24, 1932. Under these circumstances the applicable rule is: "If plaintiff's claim appears to be barred by laches, the circumstances which excuse the apparent delay must be set forth." 4 Standard Ency. of Procedure, 119. Also, "Where the bill of a suitor who has slumbered long upon his rights shows apparent laches, the suitor must generally account for and excuse his delay by proper allegations in his bill." 18 Standard Ency. of Procedure, 431. See, also, *Landsdale v. Smith*, 106 U. S. 391; *Godden v. Kimmell*, 99 U. S. 201, 212; *New Albany v. Burke*, 11 Wall. (U. S.) 96; *Badger v. Badger*, 2 Clif. 137, 154, affirmed 2 Wall. (U. S.) 87; *Alexander v. Fidelity Trust Co.*, 215 Fed. 791; *Jones v. Perkins*, 76 Fed. 82; *Kleinclaus v. Dutard*, 147 Cal. 245; *Bell v. Hudson*, 73 Cal. 285; *Wilcoxon v. Wilcoxon*, 199 Ill. 244; *Walker v.*

Ray, 111 Ill. 315; *Henry County v. Winnebago Swamp Drainage Co.,* 52 Ill. 299; *Hunt v. Forman,* 2 Dana (Ky.) 471; *Reynolds v. Green,* 10 Mich. 355; *Campau v. Chene,* 1 Mich. 400; *Lane v. Farmer,* 11 Lea (Tenn.) 568, 577; *Wichita Land and Cattle Co. v. Ward,* 1 Tex. Civ. App. 307; *Eubank v. Barnes,* 93 Va. 153; *Terry v. Fontaine's Adm'r,* 83 Va. 451; *Chezum v. McBride,* 21 Wash. 558; *Jarvis v. Martin's Adm'r,* 45 W. Va. 347; *Jackson's Adm'r v. Hull,* 21 W. Va. 601.

"But by analogy to the statute of limitations some courts hold the rule to be that the plaintiff need not allege facts avoiding the appearance of laches unless the delay is in excess of the period of limitation." 18 Standard Ency. of Procedure, 431. See, also, *Wyman v. Bowman,* 127 Fed. 257; *Boynton v. Haggart,* 120 Fed. 819; *Kelley v. Boettcher,* 85 Fed. 55; *Sabre v. United Traction & Electric Co.,* 156 Fed. 79; *Walshe v. Dwight Mfg. Co.,* 178 Ala. 310; *Fowler v. Alabama Iron & Steel Co.,* 164 Ala. 414.

In *Hays v. Port of Seattle,* 251 U. S. 233, 239, Pitney, J., in delivering the opinion of the court, says: "It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it be not excused his laches may be taken advantage of either by demurrer or upon final hearing. *Maxwell v. Kennedy,* 8 How. 210, 222; *Badger v. Badger,* 2 Wall. 87, 95; *Marsh v. Whitmore,* 21 Wall. 178, 185; *Sullivan v. Portland, etc., R. Co.,* 94 U. S. 806, 811; *National Bank v. Carpenter,* 101 U. S. 567; *Landsdale v. Smith,* 106 U. S. 391; *Hammond v. Hopkins,* 143 U. S. 224, 250; *Galliher v. Cadwell,* 145 U. S. 368, 371-373; *Hardt v. Heidweyer,* 152 U. S. 547, 559; *Abraham v. Ordway,* 158 U. S. 416, 420; *Willard v. Wood,* 164 U. S. 502, 524; *Penn Mutual Life Ins. Co. v. Austin,* 168 U. S. 685, 696-698."

Obviously the result of the pleading in this case is to create an issue on the subject of laches. It is the equivalent of defendant expressly negativing the existence of the facts affirmatively alleged by the plaintiff in the fifth paragraph of his petition, with the added allegation that there-

by "the plaintiff has been guilty of gross laches and negligence in the assertion of his pretended claim and by reason thereof has no cause of action." On principle the sufficiency of this issue to properly present the question of laches may not be gainsaid. It would seem that this conclusion finds ample support in the authorities, for the rule established by the weight of authority unquestionably is that, where the plaintiff attempts to excuse his laches, the reason of the rule (requiring the defendant to plead the same) ceases, and the defendant may avail himself of the defense even though not set up in his answer. *Hall v. Fullerton,* 69 Ill. 448; *DeWitt v. Miller,* 9 Tex. 239; *Williams v. Rhodes,* 81 Ill. 571.

But the general rule also obtains that, "Regardless of whether the defendant is or is not required to plead laches in order to avail himself of the defense as a matter of right, it seems to be a general rule that the court may of its own motion deny relief to a party because of his laches even though it be not pleaded or urged by the adverse party." 18 Standard Ency. of Procedure, 435. See, also, *Richards v. Mackall,* 124 U. S. 183; *Godden v. Kimmell,* 99 U. S. 201, 212; *Sullivan v. Portland, etc., R. Co.,* 94 U. S. 806, 811; *Marsh v. Whitmore,* 21 Wall. (U. S.) 178, affirming 1 Hask. 391; *Badger v. Badger,* 2 Clif. 137, affirmed 2 Wall. (U. S.) 87; *National Cash Register Co. v. Union Computing Machine Co.,* 143 Fed. 342; *Calivada Colonization Co. v. Hays,* 119 Fed. 202; *Lakin v. Sierra Buttes Gold Mining Co.,* 25 Fed. 337; *Leavenworth County v. Chicago, R. I. & P. R. Co.,* 18 Fed. 209; *Credit Co. v. Arkansas Central R. Co.,* 15 Fed. 46; *Gibson v. Herriott,* 55 Ark. 85; *Suhr v. Lauterbach,* 164 Cal. 591; *Stevinson v. San Joaquin, etc., Co.,* 162 Cal. 141; *Chapman v. Bank of California,* 97 Cal. 155; *Lux v. Haggin,* 69 Cal. 255; *Harris v. Hillegass,* 66 Cal. 79; *French v. Woodruff,* 25 Colo. 339, 352; *Hagerman v. Bates,* 24 Colo. 71; *Crutchfield v. Hewett,* 2 App. D. C. 373; *Mayse v. Gaddis,* 2 App. D. C. 20; *Geter v. Simmons,* 57 Fla. 423; *Predestinarian Baptist Church v. United Baptist Church,* 139 Ky. 110; *Potter v.*

Potter's Receiver, 31 Ky. Law Rep. 137; *Warburton v. Davis,* 123 Md. 225; *Syester v. Brewer,* 27 Md. 288; *Stewart v. Joyce,* 201 Mass. 301; *Snow v. Boston Blank-Book Mfg. Co.,* 153 Mass. 456; *Zebley v. Farmers Loan & Trust Co.,* 139 N. Y. 461; *Taylor v. Slater,* 21 R. I. 104; *Madison v. Ducktown Sulphur, Copper & Iron Co.,* 113 Tenn. 331, 355; *Rogers v. Van Nortwick,* 87 Wis. 414; *McCann v. Welch,* 106 Wis. 142; *Melms v. Pabst Brewing Co.,* 93 Wis. 153; *Coon v. Seymour,* 71 Wis. 340; *Smith v. Clay,* 2 Amb. (Eng.) 645. In line with these cases last cited appears the case of *Hawley v. Von Lanken,* 75 Neb. 597. See, also, *Severson v. McKenzie,* 122 Neb. 827.

We are also committed to the doctrine that, "Where the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer." *Hawley v. Von Lanken,* 75 Neb. 597.

Then, again, we are committed to a rule of pleading entirely at variance with the contention of plaintiff as applied to the admitted facts of the present case. Thus, in *Harrison v. Rice,* 78 Neb. 659, the doctrine was announced by this court in the following language: "When the suit is brought within the time fixed by the analogous statute of limitations, the burden is on defendant to show the existence of circumstances amounting to laches. When the suit is brought after the statutory time, plaintiff must plead and prove that laches does not exist."

In this connection it will be remembered that the transactions in suit occurred more than seven years prior to the commencement of the action. This fact invokes the application of the rule just quoted, and necessarily imposes on the plaintiff the burden of pleading and proving the absence of laches.

It follows that the issues of the statute of limitations and laches of plaintiff are properly presented by the record, and are to be determined by the facts established by the evidence.

Prior to January, 1925, and during the transactions involved in this litigation, Rolland F. Ireland was the secre-

tary and treasurer and practically the sole manager of the loan company. During that period it appears to have been a "one-man company" and Ireland was that man. John W. Baxter, plaintiff, was a resident of Greenwich, Connecticut, and the owner of a large tract of land comprising several thousand acres, situated in the states of Nebraska and Kansas. Mr. E. T. Weekes of Beatrice, Nebraska, was in charge of his business affairs in the two states mentioned. Baxter came to Nebraska in the spring of 1924 seeking to raise $32,000. He called on Weekes at Beatrice, but the latter could supply but $15,000. Accordingly Weekes and Baxter came to Lincoln, Nebraska, and entered into negotiations with defendant through Ireland, its executive officer. Baxter then knew of Ireland's relations with the loan company, that he made its loans, and evidently wanted to enlist Ireland's services in his own behalf. Accordingly, pursuant to an arrangement with Baxter, the details of which are not disclosed by the evidence, by two instruments in writing, each dated May 3, 1924, and executed and acknowledged by Baxter on the same day, Rolland F. Ireland was constituted Baxter's attorney-in-fact and given charge over all property and business of Baxter in the state of Nebraska, conferring general powers of agency in the broadest terms, including "full right, power and authority to bind my credit and my estate, both real and personal, by the execution and delivery of promissory notes and such other papers as may be requisite and necessary, evidencing indebtedness and receive and receipt for proceeds arising therefrom." These powers of attorney each close with the words, "the intent being that all acts and things done by the said Rolland F. Ireland in my name and as my said attorney shall be as binding as if done by myself when personally present."

The third instrument, which Baxter appears to have signed in the transactions that followed, was a promissory note for $9,000, payable on demand to the order of Rolland F. Ireland. It is identified in the record as exhibit 16. The receipt of the $9,000 loan is admitted by Baxter.

It also appears undisputed in the record that this $9,000 was paid out of the proceeds of the $55,000 note and mortgage; further, that defendant is entitled to credit for that amount. Immediately after signing the $9,000 obligation Baxter and his friend, Du Moulin, went to South Dakota to investigate certain proposed oil developments. On their return to Lincoln from South Dakota, Baxter then signed a blank promissory note and a blank real estate mortgage, and the blanks thus signed were delivered to Ireland. After some intervening time this blank note and mortgage were completed, pursuant to Ireland's direction and authority, by filling in the amounts as $55,000, a list of lands was attached to the mortgage, and these instruments thus completed appear now as exhibits 6 and 7 of the present record.

Baxter now testifies that he authorized Ireland to fill out these blank instruments, so signed by him, in the sum of $9,000 only, and his claim for recovery in this action is, in part, based on the absence of authority in Ireland to complete the same in the sum of $55,000, as well as Ireland's violation of his instructions in reference to the disposition of that sum.

However, for reasons known to themselves, Baxter and Ireland endeavored to conceal the transactions evidenced by exhibits 6 and 7. Baxter said nothing concerning this matter to Weekes, his agent in full charge of his business affairs in Nebraska, and, as we will see, failed to enlighten him as to the true situation even when expressly inquired of concerning the same.

The blank note and mortgage with the Baxter signatures affixed were placed in the John W. Baxter file, kept for a time in Ireland's office.

Though withdrawals from the loan company on the faith of the Baxter loans were commenced by Ireland, as Baxter's agent, in May, 1924, and continued so that on August 22, 1924, they aggregated $39,646.73, exhibits 6 and 7 had not then been completed and the $55,000 loan at that time had not been formally set up as an account on

the books of the loan company; neither had the transaction itself nor the payment of any of the funds thus made been reported by Ireland or the loan company's employees to its officers. The two powers of attorney likewise were withheld from the records, and only Baxter and Ireland knew of them. However, the company officers, in the late fall or early winter of 1924, employed a firm of licensed accountants to audit the books of the loan company. This auditor, in the course of his examination, discovered irregularities, including the withdrawal from the loan company for Baxter in the transaction now under consideration, which then exceeded $50,000. Thereupon exhibits 6 and 7, fully completed, then evidencing an indebtedness of $55,000, were produced and, for the first time, submitted to the officers of the loan company. Evidence contained within the record supports the conclusion that the completion of exhibits 6 and 7 was under the direction of Ireland.

The record also discloses that, when this discovery of the $55,000 transaction was made, Rolland F. Ireland was temporarily absent, in Colorado. He was informed of the situation by his brother, who was then employed by the loan company in the capacity of a bookkeeper. On November 9, 1924, Rolland F. Ireland telegraphed to the president of the loan company, as follows:

"I have on file Baxter's written authority for disbursement of all money and that is reason for indorsements. Might also say arrangements are made so that loan will be paid in full on or before due. Will show written authorization when see you."

In due time Baxter's two powers of attorney, executed May 3, 1924, were produced and submitted to the president of the loan company. In the meanwhile the president of the loan company had sought out Weekes, who he was informed represented Baxter and had charge of his business affairs in Nebraska. Weekes had no information whatever on the $55,000 loan. However, at the insistence of the president of the loan company, Weekes prepared a letter which, on November 11, 1924, by registered mail,

was forwarded to John W. Baxter at Greenwich, Connecticut. That this letter was actually received by Baxter in due course of mail is established beyond a doubt. This letter read, in part, as follows:

"I received notice yesterday from some of the loan companies that there had been a second mortgage placed on the Pawnee county lands of $55,000 by the National Mortgage Loan Company of Lincoln, Nebraska, or Mr. Ireland and associates.

"This mortgage was dated May 7, 1924, and signed by you at Lincoln, Nebraska, the amount being $55,000 and a mortgage on the twenty-five quarters, or all the land you have in Pawnee county. Of course, this is a second mortgage, and is due April 1st, 1925. That makes the land in Pawnee county, with the first and second mortgages, mortgaged for $196,000, or your land in Pawnee county is mortgaged for approximately $50 an acre. This new second mortgage of Ireland and associates of Lincoln draws eight per cent. interest from May 7, 1924, until April 1st, 1925, or $4,400 a year, then ten per cent. after maturity.

"I did not know just how much money you had received in Lincoln when you were there this last May, but was surprised at the $55,000 mortgage. The mortgage is made and then the numbers of the twenty-five quarters are pasted on it, which ties up your entire Pawnee county land. I do not know whether you received this amount of $55,000 or whether you left the amount to be filled in later and signed the mortgage, is the reason I am writing you. * * *

"This second mortgage of $55,000 to Ireland and his associates, or the National Mortgage Loan Company, * * * is to mature April 1st, 1925."

A letter written by Baxter to Rolland F. Ireland at Lincoln, Nebraska, under date of November 11, 1924, concerning the above letter thus sent from Weekes to Baxter, and established by undenied evidence, is, in part, as follows: "I enclose copy of a letter which I received through

registered mail from Weekes. He wants an answer. What am I to say?"

As to what Ireland's instructions to Baxter on this subject were may be inferred from the fact that Baxter never answered this letter of November 11, 1924, from Weekes, and wholly failed to communicate the facts relating to the transaction to the loan company.

On November 15, 1924, a second letter from Weekes is mailed to John W. Baxter at his address in Greenwich, Connecticut, in which the $55,000 mortgage to the loan company is discussed. This letter was also received by Baxter, but he never answered it.

On November 22, 1924, after certain conveyances of lands owned by Baxter to Rolland F. Ireland had been recorded, Weekes telegraphed to Baxter requesting an immediate answer, and on the same day he mailed a letter to Baxter at Greenwich, Connecticut, confirming the telegram, and amplifying the statements contained therein. To these communications Weekes received no reply. Accordingly, at the solicitation of the president of the loan company, Weekes proceeded to Greenwich, Connecticut, to obtain a personal interview with Baxter. On his arrival he ascertained that Baxter had, after the receipt of Weekes' first letter, departed for Chicago, Illinois. Weekes followed. In the annex of the Congress Hotel in Chicago Weekes met John W. Baxter in December, 1924, and his positive testimony as to the conversation then had between them is, in part, as follows:

(Answer to question 833) "I told Mr. Baxter that you (president of the loan company) told me to find him and find out about this $55,000 mortgage. * * * 834. Q. Did you tell him what this $55,000 mortgage covered? A. It covered—(interrupted) 835. Q. I mean did you tell him that? A. Yes, sir. 836. Q. Explain what you told him in regard to what the mortgage covered? A. I told him it was a $55,000 mortgage on Pawnee county, that you had come to see me in regard to it, that it would be due in six months, that the mortgage was made in May; it wasn't

filed until in November; as soon as you found it out you discharged Mr. Ireland, and that you wanted to know how much money of this he got and all about it, and, as I had written Mr. Baxter letters and couldn't hear from him, I told him about the mortgage."

The record also contains proof of the contents of a letter written by John W. Baxter from Chicago to Rolland F. Ireland, under date of December 10, 1924. In this letter Baxter said, in part:

"Weekes arrived in Chicago this morning and I have just finished a ten minutes talk with him, as he said he had a matter of great importance which he had heard of. * * * Mr. Hartigan had come to him to tell him that Mr. Ireland had placed mortgages on Mr. Baxter's lands amounting to seventy thousand five hundred dollars ($70,500) and that Mr. Ireland had done this without the authority of the company and that they had fired him for it and that they would like to know if I had received the money as they had no receipt signed by me for it. * * * I merely gave him to understand he was telling me nothing."

The record also contains an original letter, dated December 11, 1924, written by Rolland F. Ireland from Lincoln, Nebraska, to John C. Hartigan, president of the loan company, of Fairbury, Nebraska. This letter reads, in part:

"Mr. John W. Baxter has just written me saying that Mr. E. T. Weekes of Beatrice had been to Greenwich, Connecticut, to see him and he not being there Mr. Weekes had located him in Chicago. Mr. Weekes went to him and said that you had called on Mr. Weekes with reference to the company loan to Baxter and Weekes quoted you to Baxter as having said to him many disagreeable and unpleasant things concerning me. Knowing Weekes I cannot bring myself to believe that you made any such remarks, however, will be glad to talk with you concerning the same when I see you. * * * Mr. Weekes' report made no impression on Mr. Baxter he simply wrote me about it thinking I should be advised."

There appears in the record ten or more letters and telegrams written by John W. Baxter and transmitted to Rolland F. Ireland after Baxter had received the detailed and explicit information that exhibits 6 and 7, originally signed by him in blank and left with Ireland, had been completed and negotiated to the loan company as a note secured by a real estate mortgage on his lands for the sum of $55,000, due April, 1925; that proceeds thereof had been withdrawn without the filing of his personal receipts covering the same; that Ireland had been discharged by the loan company; and the further information that the company's officers who had succeeded Ireland in the management were anxiously desiring to ascertain the facts of this transaction and particularly if Baxter had actually received the amounts of money withdrawn while Ireland had charge of the loan company's affairs. These communications contain not a single expression from which it might be inferred that Baxter was surprised at the situation, so far as he was affected by it. He in no manner questions the authority for what was done. He does not even ask when, how, to whom, and in what amounts the withdrawals were paid out. He does not challenge the validity of the transaction as revealed to him, either in whole or in part. He continued his cooperation with Ireland by affirmative concealment in Ireland's behalf. When directly interrogated, he avoids making any disclosures, and consistently omits to furnish the loan company with the information which he knows its managing officers desire. This course of studied concealment was, so far as disclosed by the present record, continued by plaintiff until the commencement of the present action on June 24, 1932.

The facts just recited certainly brought Baxter within the rule so aptly stated by Chancellor Kent, viz.: "When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed." 2 Kent's Commentaries, 616.

The $55,000 note and mortgage must now be considered

as at all times the valid obligations of plaintiff, and that the subsequent payment thereof on April 7, 1925, created no new cause of action. The only questions remaining to be determined arise out of the disposition of the proceeds of this loan. It stands admitted that plaintiff has received the benefit of $9,000 of this amount. The power of disposition over the proceeds of this loan conferred upon Rolland F. Ireland by the terms of the power of attorney is not a matter of dispute and is determinable by a reasonable construction of such written instrument.

Preliminary to a consideration of the disposition of the $46,000 of the proceeds of the $55,000 loan, we are met with a challenge by plaintiff to the admissibility in evidence of defendant's exhibit 2. This is a report of an audit of the loan company for the period from January 1, 1924, to December 31, 1924, made by Campbell, Myers and Marsh. It comprises 78 typewritten pages. A number of entries contained in this exhibit were first offered and received in evidence by plaintiff, including "exhibit 2 at page 72." Thereafter, upon proper foundation laid the following offer of proof was made by the defendant: "The defendant offers in evidence the book as a whole not because,—only for the purpose of indicating the page and especially page 72, being exhibit 107." To this offer a general objection was made which the court overruled. The bill of exceptions recites that exhibit 2, containing exhibit 107, was received in evidence. The order of the court itself expresses no limitations imposed on its admission. The use by the defendant of exhibit 2 as evidence generally is now challenged by plaintiff. Section 20-1215, Comp. St. 1929, would seem conclusive against plaintiff's contention.

Apart from statute, the approved practice is: "Evidence which is admitted generally is in the case for any legal purpose for which it is admissible, although the evidence, when introduced, was intended for a particular purpose." 64 C. J. 137.

In *Sill v. Reese,* 47 Cal. 294, it was held that counsel is

not bound by the declaration of a limited purpose, so as to preclude him from drawing other deductions than those suggested by the terms of the offer, from the evidence offered, unless injustice would follow to the opposite party by permitting such new inferences. In the absence of an express understanding between counsel and the court that the evidence is to be limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues. See *Sears v. Starbird,* 78 Cal. 225; *Fox v. Stockton Combined Harvester and Agricultural Works,* 83 Cal. 333; *Devine v. Chicago City R. Co.,* 166 Ill. App. 177; *Grant v. Mutual Protective League,* 192 Ill. App. 4; *Read v. Reppert,* 194 Ia. 620; *Springer v. Westcott,* 29 N. Y. Supp. 149; *Cohen v. Morris European & American Express Co.,* 136 N. Y. Supp. 489; *Louisville & N. R. Co. v. O'Neil,* 119 Va. 611.

When evidence is admitted without qualification, it is in the case for all legitimate probative purposes. Its effect is not to be limited to the precise purpose for which it was stated to be offered. *Booth Bros. & Hurricane Island Granite Co. v. Smith,* 115 Me. 89. See, also, *First Nat. Bank v. Union Hospital,* 281 Mass. 64; *Malkowski v. Olfs,* 161 Mich. 303.

Exhibit 2, having been admitted by the trial court without qualification, must be deemed to be in the case for all legitimate probative purposes. So treated, exhibit 2 commences with a "trial balance" of all the property and obligations of the loan company at the commencement of 1924 and closes with a trial balance reflecting its condition at the termination of that year. The correctness of these trial balances is unquestioned. Exhibit 2 sets forth an itemized statement of all items of business transacted by the loan company during the year, and among other items sets out the cash receipts and cash disbursements during the year. Among the cash disbursements thus set forth are more than $50,000 of the proceeds of the $55,000 Baxter mortgage. On this basis the trial balance at the end of the year checked against physical assets in posses-

sion of the loan company was found to be correct. In view of this fact the contention that, because certain checks employed by the loan company for the purpose of disbursing the Baxter funds were drawn payable to its own order, they evidence as a fact the payments by itself to itself cannot be accepted. Indeed, plaintiff's theory on this point is wholly inconsistent with the actual facts disclosed by the audit, which fairly reflects that on December 31, 1924, less than $2,500 remained in possession of the loan company of the proceeds of the Baxter loan, which again is fully established and verified by the actual properties possessed by the loan company at that time. The evidence thus negatives the plaintiff's claim that the defendant actually received and directly appropriated the proceeds of the checks drawn payable to its own order. Thus, it clearly appears that, instead of the defendant having received the proceeds of the checks in controversy, these proceeds were actually paid out by it as directed by Ireland in the course of Ireland's agency, and when this authority was subsequently challenged the powers of attorney referred to were produced in justification of the business done.

It would appear that the situation of the loan company in the instant case is quite analogous to the not unusual situation which arises in the business world when the cashier or other executive officer of a commercial bank occupying an outside position of trust keeps these trust funds so received, properly designated as such, on general deposit in his own bank. "Banks should not be required to supervise and scrutinize withdrawals by depositor having account in trust capacity." *Martin v. First Nat. Bank*, 51 Fed. (2d) 840.

In 5 Michie, Banks and Banking, 131, sec. 57c, the following appears: "In the absence of notice or knowledge that a breach of trust is being committed by an improper withdrawal, a bank cannot question the right of its customer to withdraw funds, nor refuse to honor his demands by check; and, therefore, even though the deposit is to customer's credit in trust, the bank has no obligation to

look after the appropriation of the trust funds when withdrawn or to protect the trust by setting up a *'jus tertii'* against a demand."

These principles were approved by this court in *State v. Farmers & Merchants Bank,* 112 Neb. 840. In that case the cashier of the bank was also administrator of an estate, and had deposited the estate funds in his bank. With these facts before us we announced the doctrine: "Where money is deposited in a bank to the credit of an administrator of an estate, the bank is charged with notice of the trust character of the fund, but is not required to see that the same is properly applied or accounted for, in the absence of notice, or knowledge of facts putting it upon inquiry, that the money is being misapplied. In such case, where the fund is withdrawn upon checks of the trustee, signed in his official character, the responsibility of the bank with regard thereto is ended."

In the case just quoted from we also held that the cashier, Berge, "was the agent of the bank; he was also agent of the estate. While acting for either principal his knowledge would be imputed to that principal; but, when he acted as administrator, his knowledge gained in that capacity could not be imputed to the bank."

By parity of reasoning, what Ireland did as agent for Baxter under the facts in the instant case was not imputable to the loan company. It therefore follows that the proceeds of the $55,000 loan having been wholly withdrawn by Ireland, under powers conferred on him by the written power of attorney, plaintiff's action must fail.

However, it is plaintiff's theory that one check in the sum of $17,000, which is shown as drawn to Baxter's order, was indirectly appropriated by the loan company. It is established that in 1924 the loan company owned a $13,000 real estate mortgage given by Thomas Shanley; that the Federal Trust Company paid the Shanley mortgage to defendant (then controlled by Ireland) on February 26, 1924. This total amount was $14,137.50. It was not credited on the books of the loan company until

August 13, 1924. By the books of the First National Bank of Lincoln, plaintiff establishes the fact that the $17,000 check issued on August 13, 1924, was deposited to Ireland's checking account on that day, and on the same day a check of $16,904.41 on this account was checked out. The books of the loan company disclose that on August 13, 1924, an entry was made therein showing the payment of $14,137.50 on the Shanley loan and $2,546.91 on liberty bond interest. On that date also Ireland issued checks on his personal account in the First National Bank of Lincoln for $14,137.50, $2,546.91, and $210, which were received and cashed by the loan company. But it cannot be gainsaid that the loan company was then entitled to receive an amount equal to the amounts evidenced by the three checks. The transaction was carried on through the First National Bank of Lincoln. The loan company had no actual knowledge as to the source of the funds from which the three checks were actually paid, save as may be imputed to it, due to the fact that Rolland F. Ireland, then attorney-in-fact for Baxter, was at the same time the secretary-treasurer and managing officer of the loan company.

It would seem that the case of *State v. Farmers & Merchants Bank,* 112 Neb. 840, would negative imputed notice under the facts in this instant case. But, passing this point, it must be conceded that at the conclusion of the transaction the loan company had no property in its possession in excess of the just amount it would have been entitled to, had Ireland honestly transacted the business placed in his care. It is equally obvious that the concealment was such that without the aid of Baxter the discovery of the fraud practiced by Ireland, if such there was, was impossible. Baxter was frequently importuned for information but wholly failed to impart the necessary facts which would have resulted in discovery. Yet, if plaintiff's theory is correct, Ireland's dishonesty and treachery, aided by the wilful concealment on the part of Baxter, will unjustly operate to deprive the stockholders of

the loan company of their property to the extent of the recovery permitted in this case.

Aside and apart from the reasons already suggested, which necessitate a denial of recovery by plaintiff, it would seem that he is barred by the statute of limitations as well as by the doctrine of laches. As heretofore shown, the information actually communicated to Baxter, as early as December 10, 1924, was ample to put him on inquiry, and there can be no question that to Baxter the means of knowledge were at hand. The rule is: "Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts." 20 R. C. L. 346, sec. 7.

It is beyond question that a mere statement to the officers of the loan company, after November 15, 1924, to the effect that the $55,000 note and mortgage had been completed in violation of the instructions, and that excepting as to the $9,000 note Baxter had not authorized the disbursement of the proceeds of the loan and had actually received no part thereof, would have enabled all parties to secure proper protection. Baxter was informed that proceeds of this loan had been disbursed by Ireland's direction, whom he had constituted his attorney-in-fact, and a mere inquiry to the president of the loan company would have brought complete information and full particulars as to date, amount, and by whom such disbursements had been made. This silence Baxter maintained for more than seven years after he became chargeable with actual knowledge.

It is submitted that "The principal cannot be justified in wilfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his

failure to do so can only be explained upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case, he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have." 1 Meecham, Agency (2d ed.) 296.

In 1924 the loan company had a bond in the sum of $50,000 covering the acts of Rolland F. Ireland, its secretary-treasurer. If the theory of the transaction here in suit, now advanced by the plaintiff, is true, this bond in 1924 afforded ample indemnity for all possible losses. The seven years of silence of plaintiff has operated to bar all possible recovery on this obligation. Fraud forms an essential element in plaintiff's case. On this point the controlling principle is: An action for relief on the ground of fraud may be commenced only within four years after a discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery. *Parker v. Kuhn,* 21 Neb. 413; *Wright v. Davis,* 28 Neb. 479; *Cole v. Boyd,* 68 Neb. 146; *Davis v. Willey,* 273 Fed. 397; 37 C. J. 838.

The proceeding instituted by plaintiff is one in equity. The facts in the instant case invoke the application of the following doctrine: Courts of equity have inherent power to refuse relief after undue and inexcusable delay, independent of the statute of limitations, and in applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether an unreasonable excuse is offered for the delay. *Hawley v. Von Lanken,* 75 Neb. 597; *Eastern Banking Co. v. Robbins,* 97 Neb. 318; *Criswell v. Criswell,* 101 Neb. 349; 10 R. C. L. 395, sec. 142, and p. 406, note 21.

That the defendant has been prejudiced by plaintiff's delay cannot be denied, and the only real excuse offered—lack of knowledge—has been wholly disproved. It follows

that the laches of the plaintiff is established to such a degree as precludes any recovery by him upon the allegations of his petition, and that the district court erred in awarding judgment in his favor.

The judgment of the district court is, therefore, reversed and the cause dismissed at the costs of the plaintiff.

REVERSED AND DISMISSED.

ROSE, J., and LIVINGSTON, District Judge, dissent.

JARED FRANKLIN LARABEE, APPELLEE, V. MILDRED CADE LARABEE, APPELLANT.

FILED MARCH 22, 1935. No. 28742.

1. Appeal. Facts showing that appellant has lost the right to prosecute his appeal by voluntarily accepting payment of that part of the judgment in his favor may be brought into the record in the supreme court by a motion to dismiss and an additional transcript.
2. ———. A litigant cannot voluntarily accept payment of that part of the judgment in his favor and afterward prosecute an appeal from that part of the judgment against him.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Appeal dismissed.*

Burkett, Wilson, Brown & Van Kirk, for appellant.

Harry R. Ankeny and *Jay O. Rodgers, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

ROSE, J.

Jared Franklin Larabee, plaintiff, sued his wife, Mildred Cade Larabee, defendant, for a divorce on the ground of extreme cruelty. In an answer to the petition, defendant denied the cruelty charged by plaintiff and applied for a divorce from her husband on the ground of his extreme cruelty to her. Upon a trial of the cause the district court dismissed the petition of plaintiff and granted defendant a

divorce. The decree denied defendant permanent alimony, but contained a judgment against plaintiff for the following items: Expenses paid by defendant for upkeep of the home and for clothing for herself and her minor daughter, $119.58; unpaid temporary alimony previously allowed by the court, $23.31; fee for defendant's attorney, $100. In addition plaintiff was required to pay the costs. Defendant appealed.

A motion by plaintiff to dismiss the appeal on the ground that defendant accepted the parts of the judgment in her favor was at first overruled and she was permitted to argue the merits of her claim for permanent alimony. Upon a renewal of the attack on the appeal, the motion and a supplemental transcript accompanying it have been reexamined. Facts showing that an appellant has lost the right to prosecute his appeal by voluntarily accepting payment of part of the judgment in his favor may be brought into the record in the supreme court by a motion and an additional transcript. The transcript of the proceedings and of the judgment below was filed in the supreme court February 11, 1933. An additional transcript accompanying the motion shows that on February 27, 1933, the attorney's lien was paid and released, and that defendant, appellant herein, made on the judgment record of the district court the following entry: "February 27, 1933, decree and costs to date paid and satisfied." Plaintiff paid the sum of the entire judgment against him into court. Defendant assented to her divorce, voluntarily accepted from the clerk payment of the items in her favor and entered satisfaction of record. The case falls directly within the oft-repeated rule that a litigant cannot voluntarily accept payment of that part of a judgment in his favor and afterward prosecute an appeal from that part of the judgment against him. The law has been discussed as follows:

"The doctrine that a party who accepts the benefit of a decree in his favor waives the right to prosecute an appeal, is not limited in its application to those alone who

have accepted the full amount awarded, but applies as well where there has been part acceptance. A party, by voluntarily accepting under a decree a portion of the amount found due him, thereby as fully and completely recognizes the validity of the decree as if he had drawn the full amount allowed him. If appellant desired to prosecute his appeal he should not have accepted any portion of the fund paid into court, which was adjudged to be his. He was not compelled to accept the money, but could have allowed it to remain with the clerk of the district court until his appeal was decided. The acceptance of the money, under the circumstances disclosed by this record, precludes appellant from challenging the correctness or validity of the decree." *Harte v. Castetter*, 38 Neb. 571.

The text is supported by other Nebraska cases and by cases from other jurisdictions generally as shown by the citation of authorities in the opinion. The language in the foregoing excerpt was quoted with approval in *McKee v. Goodrich*, 84 Neb. 479. See, also, *State v. Millsap*, 112 Neb. 722.

For the reasons stated, the order overruling the motion to dismiss the appeal is vacated and the appeal dismissed at the costs of defendant.

APPEAL DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. PLATTE VALLEY STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: NATIONAL SURETY COMPANY, INTERVENER, APPELLANT.

FILED MARCH 22, 1935. No. 29188.

1. **Assignments.** By an assignment of an adjudicated claim against an insolvent state bank, the assignee acquires only the rights of the assignor.
2. **Banks and Banking: INSOLVENCY: ORDER ALLOWING CLAIM.** Where a state bank has been adjudged insolvent; a receiver appointed; receiver has filed petition asking for an order fixing

the time within which claims must be filed; such order has been made by the court and notice thereof given to creditors of the bank; all as provided by section 8-198, Comp. St. 1929; and where claim has been filed within the time prescribed and an order made allowing it and fixing its status, such order is a judgment and, unless modified at the term at which rendered, or appealed from, becomes, with the adjournment of term, a final adjudication of the claim and of its status.

3. ———: ———: FAILURE TO FILE CLAIM. Where the procedure prescribed by section 8-198, Comp. St. 1929, has been strictly followed, all claims not filed within the time fixed in the court's order are forever barred, unless the court shall, by order, direct payment thereof thereafter, which order must be entered upon a showing within six months from the time fixed by the order and notice.

4. ———: ———: ———. The provisions of section 8-198, Comp. St. 1929, apply to any claim, the holder of which looks for satisfaction to the assets in the hands of the bank's receiver.

APPEAL from the district court for Lincoln county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellant.

F. C. Radke, Barlow Nye, Milton C. Murphy and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ.

GOOD, J.

This is an appeal from a judgment dismissing petition of National Surety Company, intervener, asking allowance of a claim against an insolvent state bank, and praying that a trust be impressed upon the bank's assets in the hands of the receiver.

The Platte Valley State Bank (hereinafter referred to as the bank) was a banking institution organized under the laws of the state of Nebraska and located at North Platte. September 7, 1927, the bank was closed and adjudged insolvent. September 22, 1927, a receiver was appointed; he qualified and took possession of the bank and proceeded to wind up its affairs. October 8, 1927, the

receiver filed a petition setting forth the names and addresses of the creditors of the bank, as shown by its books or known by him to be creditors, and asked for an order limiting the time for filing of claims and fixing a day for hearing thereon. October 11, 1927, the district court for Lincoln county entered an order fixing the 7th day of December, 1927, as the time in which claims must be filed, and January 5, 1928, or as soon thereafter as they could be heard, for the hearing of claims. Due notice of this order was given by publication and by letter addressed to each of the known creditors of the bank, including intervener's assignor. The statute applicable seems to have been strictly complied with in every respect.

At the time the bank closed, School District No. 1 of North Platte had on deposit in said bank, and represented by a certificate of deposit, $14,532.51. L. E. Mehlmann was the treasurer of the school district and also assistant cashier of the bank. Mehlmann, as treasurer of the school district, filed a claim with the receiver for the amount represented by the certificate of deposit, but did not claim that the deposit was entitled to preference as a trust fund. The claim was classified by the receiver as a general deposit, and his classification was confirmed by an order of the court. Thus the school district's claim was duly allowed as a claim for a deposit and entitled to the preference which the statute accords to claims for deposits not otherwise secured and holders of exchange in a failed state bank. Thereafter a dividend of 7 per cent. was paid upon the claim by the receiver. Later the school district brought suit against Mehlmann, as treasurer, and National Surety Company, intervener herein, as surety on the treasurer's bond, and recovered judgment for the amount then due from the bank to the district. Intervener paid the judgment and took from the school district an assignment of its claim against the insolvent bank. January 21, 1932, intervener obtained an order from the district court authorizing it to intervene in the receivership proceeding, and to file the claim, herein asserted, for

preference, on the theory that the bank held the deposit as a trust fund. March 9, 1932, the petition in intervention was filed. To this petition the receiver interposed, among others, the defenses that the claim was barred by the statute of limitations and was *res judicata*. By the payment of the judgment and the assignment thereof by the school district to intervener, the latter became subrogated to all the rights of the school district. It then stood in the place of the district; its rights were neither superior nor inferior to those of the district. *Vanderlip v. Barnes*, 101 Neb. 573; *Henefin v. Live Stock Nat. Bank*, 116 Neb. 331.

Intervener contends that the action of the treasurer, Mehlmann, in filing the claim with the receiver was for his individual protection and not for the protection of the district. This contention is not well founded. The claim, on its face, shows that it was filed on behalf of School District No. 1, and in the verification Mehlmann stated that "the above and foregoing is a true and correct statement of School Dist. No. 1, No. Platte, against the Platte Valley State Bank." It is thus clear that the claim filed by Mehlmann was on behalf of the district.

Section 8-198, Comp. St. 1929, relating to the winding up of the affairs of an insolvent state bank under receivership, which was in force at the time the bank closed, *inter alia* provided that within a specified time the receiver should file a petition asking for an order of the court limiting the time for creditors to file their claims and fixing the time for a hearing thereon, and that, upon the hearing on such petition, the court should enter an order fixing the time for creditors to file claims against the bank at not more than 60 nor less than 30 days from the entry of the order; provided that notice of such order should be given of the time within which claims must be filed and when the claims should be heard in the court. Creditors of the bank were then required to file their claims within the time limit. Said section further provided: "Any claim not presented at the place or within the time fixed by such notice, shall be forever barred unless the court shall by

order direct payment thereof thereafter, which order may be entered upon a showing within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing on claims."

The procedure provided by this statute appears to have been strictly followed. Mehlmann, on behalf of the school district, filed claim for the deposit within the time fixed by the court's order. It was classified by the receiver as that of a general deposit, entitled to preference given to claims of depositors not otherwise secured and holders of exchange. Thereafter an order was made barring claims that had not been filed within the time fixed by the court's order. Thus the claim was allowed as that of a general deposit. Such allowance of claim amounts to a judgment, and has so been decided by this court on numerous occasions. *Cleary v. Fidelity & Deposit Co.*, 117 Neb. 478; *Bliss v. Bryan*, 123 Neb. 461; *State v. Nemaha County Bank*, 124 Neb. 883; *State v. Security State Bank*, 125 Neb. 516. Some four years thereafter intervener obtained an order for permission to file its claim, seeking the establishment thereof as a trust.

Intervener contends that the provision of the statute fixing the time for filing claims relates only to those of depositors of the bank, but this contention is not well founded; otherwise, there would be no occasion for the classification of claims. The applicable statute provides that the claims of depositors, not otherwise secured, and of holders of exchange shall, subject to the claims of federal, state, county and municipal taxes, be a first lien upon the assets of the bank. Then, there are other claims for deposits that are otherwise secured and claims of general creditors, whether for merchandise, salaries, or other items of indebtedness on the part of the bank. The statute contemplates that all claims, the holders of which are looking for their satisfaction to the assets in the hands of the receiver, must be filed with the receiver within the

time prescribed in the court's order, unless such claimants did not have knowledge of the closing of the bank in time to file their claims within the time limit, in which case they are accorded six months' additional time within which to present their claims.

From the record it clearly appears that the character and status of intervener's claim were adjudicated by the court while the claim was that of the school district. No appeal was taken from the order, nor was it later modified. Several terms of court have passed, and the matter has become *res judicata*. Even if no claim had ever been filed with the receiver by the district, still no recovery could be had by intervener, because the school district's claim would have been barred by the statute, and, since intervener's rights are no greater than those of the district, its claim is likewise barred.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. PLATTE VALLEY STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: FIDELITY & DEPOSIT COMPANY OF MARYLAND, INTERVENER, APPELLANT.

FILED MARCH 22, 1935. No. 29189.

APPEAL from the district court for Lincoln county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland, for appellant.

F. C. Radke, Barlow Nye, Milton C. Murphy and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ.

GOOD, J.

This is an appeal from a judgment dismissing the petition of Fidelity & Deposit Company of Maryland, inter-

vener, seeking allowance of a claim against an insolvent state bank, and to impress a trust on the bank's assets in the hands of the receiver. This case was briefed and argued with *State v. Platte Valley State Bank, ante,* p. 562. The pertinent facts in each case are in all respects similar.

The city of North Platte had a deposit of $17,029.27 in the bank when it closed. L. E. Mehlmann was city treasurer and also assistant cashier of the bank. Within the time fixed by the court's order for filing of claims, Mehlmann, on behalf of the city, filed a claim for the deposit, but not claiming it as a trust fund. The court passed upon and allowed the claim as a deposit, with the preference accorded by statute to claims of depositors not otherwise secured. The allowance of this claim amounted to a judgment. It was neither modified nor appealed from, and several terms of court have passed. Later the city sued Mehlmann and intervener, as surety on his bond, and obtained a judgment for the amount then due it from the bank. Intervener paid this judgment and took an assignment of the city's claim, and thereafter obtained an order of court permitting it to intervene and file the claim some four years after its prior adjudication.

For the reasons given in *State v. Platte Valley State Bank, ante,* p. 562, the judgment of the district court is right and is

AFFIRMED.

IN RE ESTATE OF BENJAMIN F. RAYMOND. HENRY RAYMOND, INTERVENER, APPELLANT, V. W. ROLLIN SMITH, ADMINISTRATOR, APPELLEE.

FILED MARCH 22, 1935. No. 29220.

1. Appeal. Where a cause is brought to the supreme court on appeal without a bill of exceptions or special findings, the only question that can be considered by the court is the sufficiency of the pleadings to sustain the judgment of the lower court.
2. ———. "In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received

support from the evidence, and that such issue was correctly determined." *Backes v. Schlick*, 82 Neb. 289.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

M. O. Bates, for appellant.

Hamer & Tye and *W. A. Stewart, Jr., contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

Henry Raymond, intervener in the above entitled cause, appeals from a judgment dismissing his petition in intervention and from an order confirming an administrator's sale of realty.

There is no bill of exceptions. The rule is that, where a case is brought to the supreme court on appeal without a bill of exceptions or special findings, the only question that can be considered by the court is the sufficiency of the pleadings to sustain the judgment of the lower court. *Stuart v. Burcham*, 50 Neb. 823; *Beatrice Savings Bank v. Beatrice Chautauqua Assembly*, 54 Neb. 592; *Kerr v. Adams County*, 96 Neb. 178; *Reigle v. Cavey*, 107 Neb. 446; *Gaines v. Warrick*, 113 Neb. 235; *Troyer Furniture Co. v. Orchard & Wilhelm Co.*, 121 Neb. 301.

It is also the rule that, "In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined." *Backes v. Schlick*, 82 Neb. 289. See *Reigle v. Cavey, supra; Kerr v. Adams County, supra.*

From the pleadings it appears that W. Rollin Smith, as administrator of the estate of Benjamin F. Raymond, deceased, by proper proceedings duly asked for and obtained a license to sell real estate of his decedent for the payment of debts. The realty, for the sale of which license was granted, consisted of 160 acres of land in Custer county and a residence property in the city of Lexington. Pur-

suant to the license, both of the properties were advertised for sale, and the residence property in Lexington was sold; the administrator reported such sale to the court and asked for confirmation thereof. The land in Custer county was not sold for want of bidders. At this point in the proceedings Henry Raymond, a brother of Benjamin F. Raymond, intervened and alleged in his petition that the real estate in question did not belong to the estate of Benjamin F. Raymond but that the realty belonged to and was owned by intervener. He further alleged that he and his wife had executed a deed in which the name of grantee was left blank, and left the deed in the possession of one Stewart with certain instructions; that Stewart, without authority, had inserted the name of W. Rollin Smith, Guardian, as grantee, and had delivered the deed without authority. There were other allegations concerning the purpose for which the deed was executed by intervener which need not be here considered.

To this petition the administrator filed an answer in which it was alleged that the name of the grantee in the deed was inserted by direction of intervener, and that he had instructed the delivery of the deed to Smith who was then the guardian of Benjamin F. Raymond. It was alleged further that Benjamin F. Raymond had formerly owned the realty and had, without consideration and while he was incompetent, conveyed the realty to his brother, the intervener; that thereafter an action was begun by Benjamin F. Raymond against intervener to cancel and set aside the deed, and that the deed from intervener to W. Rollin Smith, Guardian, was executed as a compromise settlement of that action. The answer contained a denial of the allegations of the petition not specifically admitted. The record recites that there was a trial to the court upon the petition in intervention, the answer of the administrator thereto, the reply of the intervener, and the evidence, and there was a general finding for the administrator, W. Rollin Smith.

In the absence of a bill of exceptions, it will be pre-

sumed that every allegation of fact, favorable to the contention of the administrator, was supported by competent evidence and was correctly determined. The allegations of the pleadings are sufficient to support the judgment entered.

The record discloses no error prejudicial to intervener.

AFFIRMED.

CONRAD HESSLER, APPELLANT, V. RICHARD C. BELLAMY, APPELLEE.

FILED MARCH 22, 1935. No. 29223.

1. Automobiles: COLLISION: EVIDENCE. Where undisputed physical facts demonstrate that collision out of which injuries arose was not caused by negligence of defendant, the evidence is not sufficient to support a verdict for plaintiff.
2. Trial: DIRECTION OF VERDICT. If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Raymond & Raymond, for appellant.

Morrow & Morrow, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

DAY, J.

The plaintiff brought this action to recover damages for the wrongful death of his wife caused by an automobile accident. This case has been tried three times in the district court. The jury returned a verdict in favor of the plaintiff upon the two former trials. Motions for new trial having been sustained in both instances, the third trial resulted in a directed verdict in favor of defendant.

The issues are set out by the pleadings. The petition

alleges that on January 13, 1933, between 7 and 8 o'clock p. m., the plaintiff was driving his automobile westward on the paved public highway, six miles east of Scottsbluff, when he met a car owned and driven eastward by the defendant; that at the time he was driving in a lawful and careful manner on the right-hand side of the pavement, and immediately before the collision he had reduced the speed of his car until it was almost stopped. The petition also alleges that the Hupmobile driven east by the defendant upon the same highway, which at the time and place was covered with a light snow and ice, was driven carelessly and negligently at a high, dangerous and illegal rate of speed and without due regard to the condition of the highway and the traffic and the rights of others using the road; that he drove his car on the left-hand side of the pavement and crashed head-on, but slightly from plaintiff's left. The defendant filed an answer in which he denies that he was guilty of any negligence at the time and place of the accident and alleges that the sole and proximate cause of the collision between the automobiles and the damages resulting therefrom was the negligence of the plaintiff in driving his car on the left-hand side of the pavement. At the close of all the testimony, the defendant moved for a directed verdict which was sustained.

The appellant assigns as error the ruling of the trial judge in directing a verdict in favor of defendant after the introduction of all the evidence. The determination depends upon the place where the collision occurred. If there is testimony before the jury by which a finding in favor of the plaintiff could be upheld, the court is not at liberty to disregard it and direct a verdict against him. *Bainter v. Appel,* 124 Neb. 40.

The only question of negligence supported by any evidence is that the defendant was driving on the wrong side of the paved road at the time of the collision. Does the evidence on this question require that the issue be submitted to the jury? We think not. The plaintiff, the defendant, and five young men riding in defendant's car

were the only eyewitnesses of the accident. The plaintiff testified that he was driving on the north (his right) side of the paved road; that he saw the defendant's car approaching for about one-quarter mile; that it was swaying and collided head-on with his car a little to the left of the front end; that, when he saw it coming, he drove closer to the north side and was almost stopped at the time of the accident.

On the other hand, the defendant and his five eyewitnesses testified that his car was driven straight down the south (his right) side of the pavement; that he observed plaintiff's car about one-quarter mile away, and he thought it was parked, because it was on the south side of the road; that, when he came near, it was moving across the pavement directly in front of him too close for him to go either way, and the collision occurred on the south side of the road. With the evidence in this condition, even though the plaintiff was outsworn numerically by the defendant and his five witnesses, it was in conflict and would have required a submission to the jury.

But in addition to this testimony, the undisputed testimony as to the physical facts is such that it demonstrates that the collision occurred on the south side of the road as claimed by defendant and his witnesses and not on the north side as alleged by the plaintiff. The plaintiff testified that after the collision his car faced northwest, with the front end two to three feet from the north edge of the pavement and the rear wheels near the middle and across the black line; that the Prestone from his radiator was emptied all at once by the crash and left a spot on the north side; that he saw the car coming a quarter of a mile away, and he "got over" on the north side. After the accident, the plaintiff was dazed and confused, and the evidence indicates that he was not capable of observing accurately at that time.

The undisputed physical facts demonstrate that he was mistaken as to the place where the accident occurred. He testified that the collision was head-on, the contact with

his car a little to the left of the front end. The pictures of his car show that his car was hit on the front end from the left. The undisputed testimony is that the defendant's car was hit on the right front end. Then, at the time of the accident, the cars collided at an angle toward the north. The impact would drive both cars to the north. But, after the collision, the rear wheels of the plaintiff's car were on or south of the black mark in the center of the pavement, which would indicate that plaintiff was turning to the north at that time and not earlier as he thought. Much stress is placed upon the location of the Prestone spot on the north side of the pavement, and it is said to demonstrate that plaintiff's car was on the north side, because the fluid was emptied "like pouring from a dishpan." Our recollection of elementary physics is refreshed by the dissertation in defendant's brief. The car was moving forward and could have moved the few feet to put the front end on the north side before the liquid was spilled even if the radiator was broken with the first contact with the other car. The defendant's witnesses put plaintiff's car at least one-third on the south side of the pavement, but even accepting as true the plaintiff's testimony as to the location of his car, the collision could not have occurred on the north side of the paved road.

Where the undisputed physical facts demonstrate that defendant was not negligent in the operation of his automobile at the time of a collision, the evidence is not sufficient to support a verdict for plaintiff. If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him. *Oliver v. Union P. R. Co.*, 105 Neb. 243; *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692; *Stryk v. Sydarowich*, 198 Wis. 542; *Anderson v. Altschuler*, 125 Neb. 853; *Sippel v. Missouri P. R. Co.*, 102 Neb. 597.

It was not, therefore, erroneous for the trial court to direct a verdict for defendant in this case.

AFFIRMED.

HARRY WEINER, APPELLEE, V. AETNA INSURANCE COMPANY, APPELLANT: ROME MILLER, CROSS-PETITIONER, APPELLEE.

FILED MARCH 22, 1935. No. 29195.

1. **Bills and Notes:** PAYMENT BY INDORSER. When one of a series of notes secured by a mortgage is paid by the indorser thereof after its maturity and nonpayment by the maker, such a note, surrendered to the indorser uncanceled is not discharged in law unless that is the intention of the parties.
2. ———: ———: SUBROGATION. Such indorser who pays off such a note is protected by the right of subrogation as to all prior parties, including rights under a "union" mortgage clause on a fire insurance policy.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed as to Rome Miller.*

Crofoot, Fraser, Connolly & Stryker and *James T. English,* for appellant.

Shotwell, Monsky, Grodinsky & Vance, Daniel J. Gross and *Leon & White,* for appellee Weiner.

Hotz & Hotz, for appellee Miller.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

PAINE, J.

On July 13, 1934, an opinion was released in this case (127 Neb. 572), finding that the trial court erred in discharging the jury and entering a judgment for the plaintiff.

This court allowed an oral argument on the motion for rehearing on March 7, 1935. However, the opinion released July 13, 1934, was adhered to without change, and the case, so far as it involves the issues made upon the plaintiff's petition and the answer of the defendants thereto, is sent back to the lower court for retrial to a jury.

In the opinion above referred to, the issues made upon the cross-petition of the defendant, Rome Miller, and the

answers thereto, were not disposed of, and this supplementary opinion will dispose of those issues.

The record discloses that Rome Miller, one of the defendants and an appellee, owned the Millard Hotel, and sold the same to Harry Weiner for $120,000 on or about May 1, 1918, $20,000 being paid in cash, and a first mortgage, signed by Harry Weiner and others, was executed to Miller to secure the payment of 16 negotiable promissory notes, 12 of said notes being in the amount of $5,000, the first one being payable May 1, 1921, and one being payable each year thereafter in the sum of $5,000 for 11 years. Four additional notes of $10,000 each were executed, payable May 1, 1934, the total face of said 16 notes amounting to $100,000. In the mortgage it was further covenanted that the mortgagors would keep the property insured for Miller's benefit against loss by fire and tornado.

On April 2, 1928, the balance then due upon the mortgage was $65,000, and Miller sold the same to the Omaha Trust Company, with recourse, and by separate instrument guaranteed the payment of the same. On July 12, 1928, the Omaha Trust Company sold and assigned the mortgage without recourse to the Central Life Assurance Society of Des Moines, Iowa, but all of the insurance thereon continued to be payable to the Omaha Trust Company, which acted as trustee for all parties, collecting the principal and interest and remitting the same to the Central Life Assurance Society. On May 1, 1931, Weiner was unable to pay the $5,000 note falling due that day, and Rome Miller, as mortgagee, indorser and guarantor, paid the same to the Omaha National Company, the receipt given therefor, being exhibit 56, reading as follows:

"May 29, 1931. Note No. 11, due May 1, 1931, signed by Harry Weiner et al., attached hereto was paid by Rome Miller as indorser and proceeds remitted this day to Central Life Assurance Society. This note is to be held by us as agent for Rome Miller for collection from the makers but subject to the lien of Central Life Assurance Society for all unpaid balances or future advancements on

the mortgage given to secure the notes executed by Harry Weiner et al., of which this is one.

"The Omaha National Company,
"By (signed) J. P. Jones.
"J. P. Jones, Ass't Sec'y."

Weiner having also defaulted in the payment of the $5,000 note due May 1, 1932, and of the real estate taxes levied and assessed upon said property, the Central Life Assurance Society brought a foreclosure action, in which Rome Miller was also included. Decree was entered by consent on January 16, 1933, finding the amount due the Central Life Assurance Society of $51,918.98, with interest at 8 per cent. In the same decree Rome Miller was granted a lien for $5,149.98 by virtue of his payment of the $5,000 note upon which default had been made on May 1, 1931. The decree provided further that upon sale of the property the lien of the Central Life Assurance Society should be paid first, and Rome Miller's next.

Every person interested in the notes and mortgage was a party to this foreclosure suit, and the decree completely adjudicated their respective rights. An application for a nine months' stay was filed at the same time the decree was entered, to wit, on January 16, 1933. On February 8, 1933, the Millard Hotel property was entirely destroyed by fire, with fire insurance thereon as set out in the first opinion in this case (127 Neb. 572).

The Aetna Insurance Company insists that Rome Miller is not one of the named insureds within the mortgage clause, and has no rights whatever under the policy. It further insists that the evidence conclusively established that Rome Miller is not one of the mortgagees, nor a successor or assignee of the mortgagee, and that he simply has a lien on the premises by virtue of having paid one of the notes, and has no interest whatever in the insurance policies.

In the reply of the Aetna Insurance Company it is alleged that the Central Life Assurance Society on October 16, 1933, sold and assigned to C. W. Mead, trustee (for all

insurance companies save one), its decree of foreclosure against Harry Weiner, and also assigned its interest in all fire insurance policies except the policies written by the Globe & Rutgers Fire Insurance Company. But said insurance company insists it did not purchase the lien of the judgment of Rome Miller, junior thereto, Miller's judgment remaining in full force and effect, and that, instead of paying the mortgage held by the Central Life Assurance Society, it had simply purchased the decree of foreclosure which it had obtained in its favor.

Rome Miller, in his answer and cross-petition, set up that the mortgage clause provided that it should not be invalidated by any act or negligence on the part of Harry Weiner, mortgagor. In Harry Weiner's reply and answer to Rome Miller's cross-petition he asked that Miller's judgment on the $5,000 note be prorated over all of the insurance companies involved, and not against the Aetna Insurance Company alone.

It has been held in many cases that a mortgagee has such an insurable interest that he can recover a loss under a fire insurance policy. In case he sells and assigns such mortgage, he does not divest himself of that insurable interest if he has indorsed the notes secured by the mortgage and any part thereof remains unpaid. *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb. 834; *German Ins. Co. v. Hyman*, 34 Neb. 704. It has been held that section 44-322, Comp. St. 1929, is a part of a fire insurance contract in Nebraska. Such matters as the assignment of a mortgage, or partial payments thereunder, do not constitute a defense in a suit on the policy by one who has an insurable interest thereunder. *Farmers & Merchants Ins. Co. v. Newman*, 58 Neb. 504. "When the mortgage debt is paid by an indorser of the mortgage note or by a surety, it does not necessarily discharge the mortgage; but the person making the payment may, if such was the intention and understanding at the time, hold the mortgage as security for his reimbursement by the person primarily liable." 41 C. J. 787.

We have a law relating to parties secondarily liable (Comp. St. 1929, sec. 62-803), which provides that, where an instrument is paid by a party secondarily liable, it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties.

In our opinion, when Rome Miller paid a part of said obligation, he had the right to hold the mortgage, together with the fire insurance, or such portion thereof as might be necessary for his reimbursement. *Hyde v. Hartford Fire Ins. Co.*, 70 Neb. 503. A surrender to the payer of a note unindorsed and uncanceled does not prove an absolute sale and transfer, but where equity demands, the payer is protected by the right of subrogation. *Allyn v. Dreher*, 124 Neb. 342.

In the judgment entered by the trial court on January 5, 1934, the court found generally that the defendant, Rome Miller, being the original mortgagee, and having indorsed the notes and taken up one of them, was entitled to the protection afforded by the "union" mortgage clause of the insurance policy as his interest might appear, and fixed the proportionate share that was due Rome Miller on his judgment lien at the sum of $97.62 on each of the $2,500 policies sued on in the case at bar, and that there was due to his attorney, William J. Hotz, the sum of $14.64, to be taxed as part of the judgment for costs against the Aetna Insurance Company. Such decree was entered on the correct theory that Rome Miller was subrogated to all of the rights of the Central Life Assurance Society in its mortgage, and all of the security back of it, including the insurance policies to the extent of the $5,000 note which he had taken up May 1, 1931. We find no prejudicial error in this part of the judgment, and the same is hereby affirmed in so far as it relates to the interests of Rome Miller.

AFFIRMED AS TO ROME MILLER.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, APPELLEE, V. MARY MCGRAW ET AL., APPELLANTS.

FILED MARCH 22, 1935. No. 29206.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring, for appellants.

Sloans, Keenan & Corbitt, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

In the above entitled case, the identical situation exists as in the case of *Howarth v. Becker,* p. 580, *post,* and for the reasons set forth in the opinion in that case, the judgment of the district court is reversed and the cause remanded.

REVERSED.

WALTER HOWARTH, APPELLEE, V. NICHOLAS M. BECKER ET AL., APPELLANTS.

FILED MARCH 22, 1935. No. 29207.

1. **Appeal.** A constitutional question not presented to the district court cannot be raised for the first time on an appeal to the supreme court.
2. **Mortgages: APPLICATION FOR MORATORIUM: BURDEN OF PROOF.** In a hearing on an application for a stay of proceedings under section 20-21,159, Comp. St. Supp. 1933, the burden of proof is upon the party resisting the application to show that he falls within the exception, "unless upon hearing on said application, good cause is shown to the contrary," contained in that statute.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Waring & Waring, for appellants.

Edward J. Kubat, contra.

J. W. Kinsinger, Perry W. Morton and *Frank D. Williams, amici curiæ.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

This action was commenced to foreclose a real estate mortgage on 80 acres of land in Fillmore county. The district court found the amount due on the first mortgage to be $6,352.50 and the amount due on the second mortgage to be $2,928.05. The decree of foreclosure was entered on February 7, 1933. Nicholas M. Becker, appellant and mortgagor, requested and obtained a nine-months' stay of the proceeding by statutory right. After the expiration of the stay, the mortgaged land was sold under an order of sale. Before a confirmation of the sale was had, Nicholas M. Becker, the owner and mortgagor of the land, applied for a moratorium staying further judicial proceedings until March 1, 1935, under the Nebraska moratory act. Comp. St. Supp. 1933, sec. 20-21,159. Under this act, mortgagors were permitted, by judicial order, to retain possession of the mortgaged premises until March 1, 1935, on condition of paying rent and complying with other terms imposed by the trial court. From an order denying the application, the appellants bring this appeal.

The appellee contends that the trial court rightfully denied the application for two reasons, first, that the moratory act, section 20-21,159, Comp. St. Supp. 1933, is unconstitutional, and, second, that the mortgage indebtedness far exceeded the value of the land, and that, under such circumstances, the trial court, under the very terms of the act, was not required to grant the application.

We have carefully examined the record in this case and we fail to find that the unconstitutionality of section 20-21,159, Comp. St. Supp. 1933, was pleaded or presented to the trial court for determination. This court has consistently held that in order for this court to consider the question of the constitutionality of a statute, it must first

be raised and placed in issue in the trial court. *First Trust Co. v. Glendale Realty Co.*, 125 Neb. 283; *Bell v. Niemann*, 127 Neb. 762. We therefore hold that the question whether the Nebraska moratory act violates the Nebraska Constitution is not determinable in this court on this appeal for the reason that it was not presented to the district court in this case.

The next question is whether the trial court erred in denying the application under the facts in this case. Under the moratory law the court is required to grant the stay therein provided for, "unless upon hearing on said application, good cause is shown to the contrary." Was good cause to the contrary shown? We think not. The holder of the second mortgage joined with the owner of the mortgaged lands in the application for the stay of proceedings. The only litigant resisting the application was the holder of the first mortgage, and he offered no evidence whatever to sustain his contention. The appellant, as mortgagor, had an absolute right to the stay of proceedings under the provisions of the statute, unless good cause was shown to the contrary. The burden of proof was upon the appellee to show that the cause was within the exception contained in the moratory act. This he did not do. The appellee failed to produce evidence that the land in question was of less value than the amount of his decree, or of any other fact or facts tending to bring the case within the exception, "unless upon hearing on said application, good cause is shown to the contrary." The appellant, Nicholas M. Becker, testified that he was willing and able to comply with the requirements of the statute as to the payment of rent, income or profits. Under such circumstances and the provisions of the statute, his right to the stay of proceedings was established and the trial court, under the record as it then was, should have granted the stay. The trial court erred in the case at bar in refusing to grant the relief prayed for in appellants' application and the judgment is hereby reversed and the cause remanded.

REVERSED.

GRACE WHEATON, APPELLEE, V. AETNA LIFE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED MARCH 26, 1935. No. 29227.

1. **Insurance**: POLICY: CONSTRUCTION. Where a group policy of insurance on employees provides no waiting time for payment of a claim under the policy, the insurance thereunder becomes due upon the receipt of proper proofs of loss at the home office of the insurance company.
2. **Interest** on the forbearance of money due in June, 1933, is at the rate of 7 per cent.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed as modified.*

Brown, Fitch & West, for appellant.

Wear, Garrotto & Boland and *R. E. McCormack, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOSS, C. J.

Grace Wheaton, 55, had long been employed by Swift & Company at Omaha, and was insured for $1,000 each in two group insurance disability contracts made between Swift & Company Employés Benefit Association of Chicago, Illinois, and Aetna Life Insurance Company of Hartford, Connecticut. She probably became totally disabled as early as November 1, 1932, but made no proofs of loss until she retained her present attorneys on May 29, 1933, and on the same day these proofs were by them prepared and forwarded. They were received at the home office of the insurance company on June 1, 1933. June 16, 1933, she filed her petition, in her own name, to recover on the policies. Soon thereafter it was discovered that she was and had been for some time mentally incompetent, and had engaged several other and different attorneys to handle the collection of her insurance. To relieve her from contracts for fees and that her settlement with defendant might be effectually made, proceedings were instituted to that end, and she was, by the insanity board of

Douglas county, adjudged insane on July 17, 1933. On August 3, 1933, the county court of Douglas county appointed Gerald F. Nye her guardian, and on August 7, 1933, he was substituted for his ward as plaintiff in the action she had begun and filed an amended petition on the same day.

The wide separation of the various parties in interest in Omaha, Chicago and Hartford made the investigation slow. The policy is not in evidence, but it is agreed that it provided no waiting time for payment after proofs of loss are furnished. When the guardian was substituted as plaintiff, defendant's attorneys were not yet authorized by defendant to settle, and so, on August 28, 1933, they filed a demurrer to the petition of the guardian, in order not to be in default. This was overruled and on October 9, 1933, defendant answered and paid $2,000 into court as for the amount due plaintiff, pleading that the policies provided that the benefit association should designate which of several optional payments would be acceptable, and that, pursuant to defendant's request to designate the manner of payment, the benefit association had designated a lump sum payment. In its answer it did not disclose when the designation of a lump sum as the manner of payment of the policies was received, but Mr. West, one of the attorneys for defendant, testified that his firm, on August 18, 1933, received a letter from the home office, dated August 16, 1933, instructing them to admit liability for $2,000. At that time the attorneys were sparring over the attorney fees to be allowed if the cause went to judgment, the attorneys for plaintiff wanting $200 in case of compromise and defendant willing to pay $100. They were unable to agree and the case went to trial. It was tried December 2, 1933, to the court, at the October term.

The court allowed plaintiff a judgment for $2,000 and allowed him $200 attorney fees. Appellant brought the cause here, assigning as error that, under the evidence, record and law, the court erred in allowing an attorney fee and that, in any event, the fee is excessive. Plaintiff

cross-appealed, assigning as error that the court refused "to allow the computed interest on the principal sum of the policies and cover the same in the judgment." In plaintiff's brief he claims "that there should be added to the judgment the sum of $46.66, which is interest for four months from June 1, 1933, the date of the proof of loss, to October 9, 1933, the date of the filing of the answer."

Interest on the forbearance of money was, at the time this claim arose, 7 per cent. Comp. St. 1929, sec. 45-102. It was changed to 6 per cent. by an act, without an emergency clause, approved May 10, 1933. Laws 1933, ch. 84. The legislature in that year adjourned May 9, 1933. The act did not "take effect until three calendar months after the adjournment of the session at which it passed." Const., art. III, sec. 27. Therefore, the rate here would be 7 per cent.

While, generally, no claim is made for interest in such a situation until the insurance company has had a reasonable time to make investigation, yet there having been no waiting time agreed upon in the policy, there was a forbearance on the part of plaintiff from the time the proofs were received at the home office. We do not find the proofs of loss in the evidence, but the letter of transmittal by Grace Wheaton and another letter written by her to the home office on June 16, 1933, asking the company to send the insurance money, were sufficient notices that the lump sum was selected, if that were necessary. As to the plea of defendant that the benefit association was charged with the duty of making a selection of the optional method of payment, the policy is not in evidence and we cannot determine from it what, if any, was its provision in that respect. There is in the evidence a letter from the home office dated July 18, 1933, to the attorneys for defendant, saying: "We are approving this claim for payment," and saying that on this policy Swift & Company, the employer, is to designate the mode of settlement, that they have written the employer and "as soon as we receive an answer from the employer, we will inform you how this claim will

be settled." That was about seven weeks after proofs of loss were received. We have seen, from the statement of the facts, how the matter dragged along after this.

We are of the opinion that, under the agreed form of the policy, providing no waiting time, and the circumstances, there was a forbearance of the money from the time the proofs of loss were furnished. While this would amount to somewhat over four months, yet that is all plaintiff asks on his cross-appeal. The trial court perhaps allowed the generous fee of $200 and omitted this interest, because the principal of the policies had been paid into court, hoping this would make an end of the controversy. Nevertheless, we think the judgment was too low to the extent of $46.66, which should have been allowed for interest. The district court is directed to modify the judgment to that extent. We are of the opinion that the $200 attorney fee allowed plaintiff in the court below was ample to cover fees in both courts and make no allowance here. As thus modified, the judgment will be affirmed.

AFFIRMED AS MODIFIED.

MATTHEW J. GREEVY, ADMINISTRATOR, APPELLANT, V. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED MARCH 26, 1935. No. 29175.

1. Trial. "Where both plaintiff and defendant in an action at law move for a peremptory instruction at the close of all the evidence, the trial court may excuse the jury and determine the issues by findings equivalent to the verdict of a jury." *Andrews v. Commercial Casualty Ins. Co.*, *ante*, p. 496.
2. Insurance: SUPPLEMENTAL CONTRACT. The statutory provision forbidding the issuance of a life insurance policy containing a provision for a settlement at maturity for less than the amount promised on the face of the policy does not prevent a supplemental contract between the insurer and the beneficiary for a life annuity in lieu of a lump sum payment of the amount of insurance due the latter.
3. ———: FRAUD. On appeal, evidence *held* sufficient to sustain a finding by the trial court that a contract for a life annuity

in lieu of a lump sum payment of the amount due on a life insurance policy was not procured by fraud of the insurer.

APPEAL from the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Affirmed.*

Edith Beckman, for appellant.

Brown, Fitch & West, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

ROSE, J.

This is an action at law to recover alleged unpaid proceeds of a life insurance policy issued to Edwin N. Greevy, insured, October 3, 1917. His mother, Addie M. Greevy, was a beneficiary. When the policy was in force August 2, 1929, insured was killed in an airplane accident. His mother died October 25, 1930. Matthew J. Greevy, administrator of the estate of Addie M. Greevy, deceased beneficiary, is plaintiff and Massachusetts Mutual Life Insurance Company, insurer, is defendant. Plaintiff demanded judgment for $1,296.37 as unpaid proceeds of the insurance policy and defendant offered to pay $101.16 as the amount due. From a judgment rejecting all of plaintiff's claim except $101.16, which was allowed, plaintiff appealed.

The petition contained the plea that there was due the beneficiary upon the death of insured unpaid insurance in the sum of $1,455.69 and that insurer paid her during her life $159.32, leaving an unpaid balance of $1,296.37.

The answer of defendant admitted there was due Addie M. Greevy, beneficiary, at the time of insured's death $1,455.69, but alleged that thereafter, August 22, 1929, she requested optional methods of settlement and, August 26, 1929, entered into a supplemental agreement with insurer, providing for monthly instalments of $11.38 payable to her from August 12, 1929, during her life; that the monthly payments were to continue until the end of the last annuity year; that insurer paid 15 monthly instal-

ments of $11.38 each and that monthly payments amounting to $101.16 remain unpaid, a sum tendered to the administrator.

In a reply to the answer plaintiff alleged that the supplemental agreement violated the statute forbidding the issuance of a life insurance policy containing "A provision by which the settlement at the maturity of any policy after the expiration of the contestable period thereof, shall be of less value than the amount promised on the face of the policy plus dividend additions, if any, less any indebtedness to the company on or secured by the policy, and less any premium that may, by the terms of the policy, be deducted." Comp. St. 1929, sec. 44-603. It was alleged further in the reply that the beneficiary was mentally incompetent to request optional methods of settlement and to enter into the supplemental agreement and that those instruments were procured by duress of insurer.

At the close of the evidence each side moved for a peremptory instruction to the jury. In this situation the trial court determined the issues of fact in favor of insurer, defendant, under the following rule:

"Where both plaintiff and defendant in an action at law move for a peremptory instruction at the close of all the evidence, the trial court may excuse the jury and determine the issues by findings equivalent to the verdict of a jury." *Andrews v. Commercial Casualty Ins. Co., ante,* p. 496.

It follows that findings in favor of defendant are not reversible on appeal unless clearly wrong. Plaintiff argues that the settlement or supplemental agreement violates public policy as declared by the statute. The point does not seem to be well taken. The restrictions imposed by the statutory provisions quoted apply to the terms of the policy, not to a settlement for a life annuity after liability for a definite amount of life insurance accrued. In the case at bar the parties agree on the exact amount due the beneficiary at the time of insured's death. Whether full payment should be made in a lump sum in currency

or in the form of a life annuity was the subject-matter of negotiations resulting in the supplemental agreement. With the unpaid proceeds of the insurance, the beneficiary had a right to enter into a contract for a life annuity. The insurer was engaged in the business of selling annuities and had in its hands belonging to the beneficiary the purchase price of a life annuity. The terms of what amounted to the sale and purchase of a life annuity were stated in the supplemental agreement. Responsible insurers and men of affairs are constantly entering into contracts for annuities on recognized principles. Responsibility for investments may be thus transferred from inexperienced individuals to capitalized corporations utilizing the services of experts in finance. The supplemental agreement is fair on its face and does not conflict with the statute.

An examination of the record from every standpoint shows that the findings and judgment of the district court are fully sustained by the evidence. The issuance of the policy, the facts showing the liability of insurer for the stipulated life insurance, the request of the beneficiary for optional methods of settlement and the execution of the supplemental agreement were admitted or proved. The parties agreed on the amount due upon the death of insured and the evidence tends to prove that insurer issued a check therefor; that the beneficiary declined to accept the check and in lieu thereof entered into the contract for a life annuity, payable in monthly instalments of $11.38 each; that she accepted such payments for 15 months; that insurer tendered to the administrator $101.16 for the remainder of the last annuity year.

In contracting for monthly payments the beneficiary escaped individual responsibility for the safe-keeping or investment of her insurance fund and secured for herself a monthly income during her life. The insurer assumed responsibility for investment of the insurance fund and ran the risk of the beneficiary living beyond her expectancy of life as shown by mortality tables. These are

legitimate factors in both life insurance and life annuities. The evidence does not prove fraud in the execution or terms of the supplemental agreement.

Findings of the trial court in favor of defendant on the issues of mental incompetency of the beneficiary and of duress on the part of insurer are fully sustained by the evidence. Error in the proceedings and judgment below does not affirmatively appear in the record.

AFFIRMED.

EMMA FRIED, ADMINISTRATRIX, APPELLEE, V. CHRISTIAN BUHRMANN ET AL., APPELLANTS.

FILED MARCH 26, 1935. No. 29192.

Landlord and Tenant. Where a landlord, leasing a furnished apartment, warrants the safety of the furniture and agrees to keep it in repair, it fixes his duty, and he is liable to members of tenant's family for injuries resulting from his negligence in failing to perform this duty.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Harry R. Ankeny, for appellants.

Perry, Van Pelt & Marti, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

DAY, J.

This is an action for wrongful death brought by the administratrix of the estate of Donald Fried, deceased. Donald Fried was six years of age at the time of his death. John and Emma Fried, his parents, leased an apartment from Grace Hoff and Gilbert Buhrmann, who were defendants here, together with Christian Buhrmann, who was alleged to be an employee of the other defendants. Mrs. Fried was engaged in washing clothes on the day of the fatal accident. As a condition to her permission to wash clothes in the apartment, she washed the clothes for de-

fendants Gilbert and Christian Buhrmann. Just before the accident, Christian Buhrmann brought the clothes to the apartment to be washed. While there, he engaged in play with the boy, now deceased, when the stand upon which the gas plate rested, and upon which water was heated in a washboiler, gave way, spilling hot water on the child and burning him so that he died the next morning. The jury returned a verdict for $1,000 against all three defendants, and a judgment was entered thereon from which they appeal.

The apartment was leased by Grace Hoff and Gilbert Buhrmann. There is evidence tending to prove that as an inducement to the lease they warranted the condition of the furniture to be safe. The allegation is that the furniture was substantial and they would warrant it was in good repair and that they would keep it in good repair. This is disputed, but the jury have resolved this question of fact in favor of plaintiff. Defendant Grace Hoff alleged as a defense that at the time of the accident she had sold the furniture and assigned her lease to the premises to her son. This was likewise a question of fact that has been settled by the verdict.

The plaintiff brought this action for negligence, on the theory that the failure of Hoff and Buhrmann to keep the furniture in good repair was negligence for which they were liable for the wrongful death under section 30-809, Comp. St. 1929. It is the defendants' argument that this is an action both on a contract and on a tort. Of course, a cause of action on a contract cannot be joined with a cause of action in tort. *Commercial Union Assurance Co. v. Shoemaker,* 63 Neb. 173. But the plaintiff contends that the contract merely fixes the duty between the landlord and tenant and that a failure to perform this duty so fixed is negligence. The case was submitted to the jury upon the question of negligence to keep furniture safe and in repair and on the charge of the negligence of Christian Buhrmann as an employee of the other two defendants.

The parents rented the apartment for themselves and

their family, including deceased. The safety and the sufficiency of the furniture were warranted at the time and a promise made to keep it in repair. This action for damages is founded upon the continuing negligence of the defendants. The lease and the warranty are important in that they determine the rights and duties of the landlord and tenant. In *Moore v. Steljes*, 69 Fed. 518, it was said in a similar case: "The premises were let to the father for occupation by his family, including the plaintiff, and injury to her would be a natural consequence of the dangerous ceiling; and the warranty was made in view of this consequence. And, although the plaintiff could not maintain an action upon the warranty, it serves to fix the negligence which caused the injury to her upon the defendant."

In *Glidden v. Goodfellow*, 124 Minn. 101, the plaintiff, an employee of the Smith Typewriter Company, contracted a cold which developed into tuberculosis, because the landlord of her employer did not heat the premises according to his contract. The court held: "Where the landlord by the terms of the lease expressly contracts to keep the leased premises in repair, a legal duty thereby arises on his part toward third persons lawfully upon the premises to perform the contract, and a negligent failure to do so, which results in injury to such third person, renders him liable for such damages as may have been suffered in consequence of his negligence." See, also, *Merchants Cotton Press & Storage Co. v. Miller*, 135 Tenn. 187; *Ousley v. Hampe*, 128 Ia. 675; *Mesher v. Osborne*, 75 Wash. 439. These actions were held to be in tort and in most of them there was no privity of contract between the landlord and the one injured.

In view of these decisions, we are constrained to hold that where a landlord, leasing a furnished apartment, warrants the safety of the furniture and agrees to keep it in repair, it fixes his duty, and he is liable to members of tenant's family for injuries resulting from his negligence in failing to perform this duty. The evidence is sufficient

to support a finding that the stand upon which the gas plate and washboiler rested was not substantial and in good repair and that defendants did not keep it in good repair.

Since we entertain this view as to the liability of the landlord, it is unnecessary to discuss other propositions discussed in the briefs as to privity of contract and as to the applicability of the wrongful death statute in an action founded upon breach of contract.

It is also urged that the evidence is insufficient to support the verdict upon the negligence of Christian Buhrmann in that (a) he was an employee and (b) he was within scope of his employment and (c) he was negligent.

There is evidence that he was working about the place and living there; that he was working with the knowledge of the other defendants; that at the time in question he brought his clothes and Gilbert Buhrmann's to be washed; that he had previously carried water to the apartment for washing; that he had been working as caretaker and janitor; that he fired the boiler, rented rooms and collected rent; that his pay for such work consisted of his board, room, spending money, and laundry. In view of the fact that as a part of his compensation he was to get his laundry done, it was the business of the other defendants to have it done. One defendant, Gilbert Buhrmann, had made arrangements for Mrs. Fried to do it. He took it there and while there the accident happened. There is also evidence that Christian Buhrmann negligently hit the defective stand with his foot and that this negligence concurred with the negligence of the defendants Gilbert Buhrmann and Grace Hoff in their failure to perform their duty as fixed by the warranty. This evidence is sufficient to support the verdict of the jury that the concurring negligence of the defendants was the proximate cause of the accident. There is a conflict in the evidence. This court will not set aside a verdict rendered on conflicting evidence unless clearly wrong. An examination of the record reveals no reversible error.

AFFIRMED.

HUGO A. LEISY, APPELLEE, V. OWEN KANE, APPELLANT: A. R. OLESON, INTERVENER, APPELLANT.

FILED MARCH 26, 1935. No. 29172.

1. Chattel Mortgages: CONSTRUCTION. "A chattel mortgage, describing cows and their increase, made during the period of gestation, creates a lien upon the calves resulting from such gestation and continues such lien while the calves are being nurtured by their mothers during a reasonable period." *Peterson v. Citizens Bank*, 117 Neb. 327.
2. ———: ———. The "reasonable time" during which the calves in gestation when a chattel mortgage was given, which included them therein as "increase," are considered as running with their dams depends entirely upon the facts and circumstances of each particular case, and is to be decided as a question of fact.
3. ———: ———. When that "reasonable time" has passed, such calves, which can no longer be so identified as coming within the "increase" of such cows when mortgaged, are no longer embraced therein.

APPEAL from the district court for Cuming county: CHARLES H. STEWART, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

Zacek & Nicholson, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

PAINE, J.

This is a replevin action, brought by Hugo A. Leisy, plaintiff and appellee, against Owen Kane, defendant and appellant, to recover certain calves as the increase of certain cows covered by chattel mortgage.

On March 3, 1924, Owen Kane and wife gave said Leisy a note for $12,000, upon which payments were made amounting to a total of $990.50, the last payment being dated September 16, 1929. On June 23, 1931, Kane gave Leisy a chattel mortgage upon certain cows and their increase to secure a part payment of the balance on said note.

The intervener, A. R. Oleson, secured from Kane a chattel mortgage, dated August 12, 1932, to secure payment of a note, dated the same date, for $450, which chattel mortgage covered 30 calves from two weeks old to eight months old. Under this mortgage intervener claimed possession of the 13 calves taken from Kane by Leisy on the writ of replevin.

The principal issue tried was the question whether the appellee, Leisy, had a lien upon the particular calves taken on replevin as against the mortgage of the intervener. The case was first tried in the county court to a jury, which returned a verdict in favor of Leisy. Upon appeal to the district court, and trial upon the same pleadings, the trial court at the close of the evidence directed a verdict against Owen Kane, and submitted the issues between Leisy and the intervener to the jury, which jury also returned a verdict in favor of Leisy.

The evidence disclosed that the mortgage given to Leisy covered all the cows owned by Kane on the date thereof, such clause reading, "together with all increase of the above described live stock, which is all of the kind now owned by me, whether in excess of the specified number or not."

A chattel mortgage upon a specified number of cows, expressly reciting that it is the mortgagor's intention to mortgage all cattle owned by him, and further reciting that the number specified is all of the kind owned by him, is a sufficient description to include all of the cows then owned by the mortgagor, irrespective of the number specified. *Peterson v. Citizens Bank,* 117 Neb. 327; 11 C. J. 461; *Hosmer State Bank v. First State Bank,* 48 S. Dak. 320; *Rawlins v. Kennard & Son,* 26 Neb. 181; *Farmers & Merchants State Bank v. Sutherlin,* 93 Neb. 707.

The principal questions submitted to the jury, under appropriate instructions, were two: First, were the cows mentioned in the plaintiff's mortgage dated June 23, 1931, or some of them, pregnant with calf on said date? Second, were the 13 calves, or any of them, claimed by

plaintiff the increase of said cows as a result of said pregnancy?

The intervener sets out, as the first error relied upon for reversal, the error of the court in instructing the jury that Owen Kane has no interest in the calves in controversy which you are called upon to consider in this action. There could have been no question that these calves were covered by either one or both of these mortgages, and, therefore, there was no error in the court instructing the jury, in effect, that Kane's interest was inferior to that of the two mortgagees in this suit.

The evidence on many points was sharply in dispute, beginning with the period of gestation of a cow, the testimony varying from nine months to nine months and ten days. The time in which calves born to his cows were allowed by Kane to be nursed by their mothers before weaning was also in dispute. The 13 calves taken on the writ of replevin September 2, 1932, were the older and stronger ones, weighing on the average 490 pounds, and the little calves were thrown out as too young to claim under the mortgage dated June 23, 1931.

Sharp criticism is made of instruction No. 8½, reading as follows: "You are instructed that a chattel mortgage describing cows and their increase, made during the period of gestation, creates a lien upon the calves resulting from such gestation and continues such lien while the calves are being nurtured by their mothers during a reasonable period. What is a reasonable period under all the circumstances and the evidence in this case is a question for the jury. This rule would only apply in the controversy herein between the intervener and the plaintiff. Therefore in this case if you find from the evidence that the plaintiff failed to take possession of said calves or any of them within such reasonable time his right so to do would terminate and your finding should be for the intervener as to any such calf or calves."

This is a correct instruction, and is taken in part from the case of *Peterson v. Citizens Bank*, 117 Neb. 327. See

11 Neb. Law Bulletin, 294; *Darling v. Wilson,* 60 N. H. 59, 49 Am. Rep. 305; *Funk v. Paul,* 64 Wis. 35, 54 Am. Rep. 576; 1 R. C. L. 1072, sec. 14.

The evidence as to whether the calves born of pregnancy in process upon June 23, 1931, and which were seized on the writ September 2, 1932, were taken within the reasonable time they could follow their mothers, was submitted to the jury. Was this error on the part of the court?

What is a reasonable time within which an act must be done may be a question of law. "Where the facts are clearly established, or are undisputed, or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury, before any judgment can be formed, whether the time was or was not reasonable." *Hill v. Hobart,* 16 Me. 164.

"The words 'reasonable time' have no set limits and no precise definition, but what constitutes a reasonable time depends entirely on the facts and circumstances of each particular case, and is to be decided in each case as a question of fact." *In re Sternberg,* 300 Fed. 881.

It is clear that a chattel mortgage which covers "increase" will include calves which are born later, but were then in gestation, during all of the time such calves are running by the side of the cows for a reasonable time, but if such calves have definitely left the cows and can no longer be identified, they would not be covered by such mortgage. Therefore, this question of what was a reasonable time was submitted, under proper instructions, to the jury, and the jury decided for the plaintiff, and this court is bound by such a verdict because it involves only questions of fact.

We have examined all the other errors alleged, and finding no prejudicial error in the record, the judgment of the trial court is

AFFIRMED.

BOHOUS R. HOBZA, APPELLEE, V. STELLA A. HOBZA, APPELLANT.

FILED MARCH 26, 1935. No. 29182.

1. **Divorce:** CUSTODY OF CHILDREN. In considering the custody of a child, the matter of primary concern is the welfare and best interests of such child. This is paramount to the wishes of parents or grandparents.
2. ———: ———. The father is entitled to the custody of the daughter, rather than the maternal grandparents, where he is an entirely proper person, and has a satisfactory place to keep her, considering all facts relating to her age, care, education, and maintenance.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Wertz & Otradovsky and *W. I. Allen,* for appellant.

Cowan & Grady, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

PAINE, J.

This is an appeal by the wife in a divorce case, in which the husband was granted the divorce on his petition charging her with extreme cruelty.

In his petition the husband also charged adultery with a named corespondent, and much of the evidence taken was upon that issue. However, the decree entered by the court specifically states that no finding is made on the issue of adultery.

A sharp contest was made as to the custody of the only child, Audrey Mae Hobza, a daughter, over seven years old.

The court, after listening to the evidence of all of the interested parties, and observing them closely in court, decided generally that the care, education, custody and control of the minor child, Audrey Mae Hobza, should be awarded to the father, Bohous R. Hobza, the plaintiff in the case, subject always to the further order of this court,

and that the mother should have the right to visit the daughter at reasonable hours as often as she wished, without restraint or interference from the plaintiff or any one acting in his behalf; and, further, that she should have the privilege, if she wishes, of taking the little girl with her, except when she is in school, for a reasonable length of time, perhaps a week, or even a month during the summer vacation.

The welfare of the child is the matter of primary concern, paramount to the wishes of parents or grandparents. Both parents asked for the custody of the child. The defendant, without just cause, deserted the plaintiff and abandoned this little daughter at a neighbor's, leaving a note telling the father where to find her. Since that time this defendant has traveled around over the state, visiting many towns, and working as a maid in families. The court had the decision to make of giving the custody of this daughter to the parents of the mother, or awarding the custody to the father, who has a good home, with his relatives in the home, who could assist him in properly caring for her. The father is under legal obligation, which he will cheerfully perform, of protecting, clothing, feeding, and educating his daughter. Further, the father is an entirely proper person, and has a satisfactory place to keep her. Under these circumstances, the father is primarily entitled to the custody of his daughter; the order of the district court in so awarding custody is hereby approved. *Voboril v. Voboril,* 115 Neb. 615; 9 R. C. L. 471, sec. 285; *State v. Smith,* 6 Greenl. (Me.) 462, 20 Am. Dec. 324; *Norval v. Zinsmaster,* 57 Neb. 158; *In re Guardianship of Peterson,* 119 Neb. 511; *Terry v. Johnson,* 73 Neb. 653.

The parents of the defendant did invest some $4,100 in the small farm of the plaintiff to assist the young couple in getting a start, and $1,000 in furniture, which they have taken back. The plaintiff's parents also assisted to the extent of about $11,000, and as this small farm is now encumbered with a mortgage of $9,800, with taxes unpaid since 1932, the chances are that the mortgage will take the

farm, and that all of the original investment will be lost. Nothing in this transaction would justify the court in awarding the defendant a judgment against the plaintiff in the sum of $4,100, or any other sum.

In *Miller v. Miller*, 89 Neb. 239, we held: "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty."

In our opinion, the decree is amply sustained by the evidence. Finding no prejudicial error in the decree of the trial court, the same is hereby

AFFIRMED.

GEORGE A. PARKS ET AL., APPELLANTS, V. JAMES J. PARKS COMPANY ET AL., APPELLEES.

FILED MARCH 26, 1935. No. 29218.

1. **Corporations.** A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings.
2. ———. It is essential to the existence of a *de facto* corporation that there be a charter or some law under which a corporation with the powers assumed might lawfully be created; a *bona fide* attempt to organize a corporation under such law with a colorable compliance with its requirements; and an actual user of corporate power.
3. ———. Where a company adopts amendatory articles of incorporation, including therein by reference the articles of the old corporation which has expired because of its own limitation as to time provided in its articles; subsequently files the amended articles with the secretary of state and the county clerk of its residence; later holds an organization meeting and elects officers and directors, followed by the holding of meetings and the transaction of business in a manner appropriate to a corporation; pays its corporation taxes annually thereafter; and exercises the general powers of a corporation toward the business for the carrying out of which it was purported to have been organized, said business being a "lawful business" within

the meaning of section 24-201, Comp. St. 1929, *held* that such facts are sufficient to constitute it a *de facto* corporation.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

M. O. Cunningham, for appellants.

L. J. Te Poel, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

The appellants, George A. Parks and James J. Parks, Jr., instituted this suit in equity in the district court for Douglas county against the James J. Parks Company, a corporation, James J. Parks and John F. Parks, praying that the James J. Parks Company be adjudged and decreed a copartnership, that a receiver be appointed, its assets distributed and the company dissolved. From an adverse decree of the district court finding that the James J. Parks Company was "at least a *de facto* corporation, and the members thereof shareholders in said corporation," the appellants bring the case to this court for review.

The record discloses that on February 25, 1914, James J. Parks, Henry F. Ryan and George A. Parks associated themselves together and organized the corporation known as James Parks Company which, under the terms of its articles of incorporation, was to exist for a period of 10 years. It appears that on the expiration of the 10-year period the parties, including others who had become stockholders, continued to act as a body corporate during the years 1924 and 1925. It further appears that in the year 1926 the appellants and the individual appellees had become the owners of all the stock of the alleged corporation. On December 13, 1926, all of the stockholders, including the appellants, adopted a number of amendments to the articles of incorporation of James Parks Company, caused them to be filed with the secretary of state, recorded with the county clerk of Douglas county and published as re-

quired by law. The amendments in substance changed the name of the entity from James Parks Company to the James J. Parks Company; changed the principal place of business from South Omaha, Nebraska, to Omaha, Nebraska; authorized the issuance of $20,000 capital stock, divided in 80 shares of $250 each, instead of $6,000 capital stock divided into 20 shares of $300 each; changed the amount of indebtedness to which it could subject itself from two-thirds of its subscribed capital stock to two-thirds of its paid-up capital stock; and provided that the corporation should continue for 50 years from the filing of the articles of incorporation with the county clerk of Douglas county, Nebraska, which was done on December 13, 1926. On December 26, 1933, the appellants filed their amended petition in the district court upon which this suit is based.

The only question to be decided in this case is whether or not the James J. Parks Company is a corporation, either *de jure* or *de facto*. If it is a corporate entity, this suit cannot be maintained. A suit to dissolve an existing corporation must be by direct attack, the proper remedy being an information in the nature of a writ of *quo warranto*. On the other hand, if the alleged corporation has no existence either *de jure* or *de facto*, its legal existence is subject to collateral attack and appellants could successfully maintain their action if the evidence was sufficient to support it.

A corporation *de jure* has been defined by this court as one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. *Capps v. Hastings Prospecting Co.*, 40 Neb. 470. But, ofttimes, an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and acts as, a corporation. It may, however, be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*; that is, a corporation from the fact of its acting as such, though not in law

or of right a corporation. *Finnegan v. Noerenberg*, 52 Minn. 239. It is a fundamental principle that there cannot be a corporation *de facto* where there are no laws authorizing a corporation *de jure*. Do the statutes of Nebraska authorize the organization of a corporation *de jure* in the case at bar? We hold that they do. The nature of the business of the James J. Parks Company was a general paving, grading and construction business, including sewer construction. That this is a "lawful business" within the meaning of section 24-201, Comp. St. 1929, there can be no question. By substantially complying with the laws of this state on the subject, the James J. Parks Company could have been a corporation *de jure*. Whether or not the James J. Parks Company was a corporation *de jure* will not be decided in this case in view of our subsequent finding that it is a corporation *de facto*. Such a finding is decisive of every issue raised in the case at bar.

It is essential to the existence of a *de facto* corporation that there be (1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; (2) a *bona fide* attempt to organize a corporation under such law; (3) a colorable compliance with the requirements of such law; and (4) an actual user of corporate power.

The evidence shows that on January 3, 1927, following the filing of the amended articles of incorporation with the county clerk of Douglas county, an organization meeting of the alleged corporation was held. George A. Parks, one of the appellants, was elected an officer at that time and continued as such until this suit was brought. He signed the original articles of incorporation, the amended articles of incorporation and numerous returns to the secretary of state for state corporation taxes due. James J. Parks, Jr., the other appellant, was a stockholder of the James J. Parks Company from January 3, 1927. He also signed the original articles of incorporation as well as those of the new organization and was a director of the company until the commencement of this action. That

the company carried on the business of the corporation, there is no dispute. It published notices of indebtedness and paid its corporation taxes every year. It entered into contracts as a corporation and did everything that it would have done had it been a corporation *de jure*. The elements necessary to constitute a corporation *de facto* are all present.

The first element heretofore mentioned is found to be present by the previous holding in this opinion that the James J. Parks Company could have been a corporation *de jure* if the requirements of the statute had been substantially complied with. That there was a law under which the James J. Parks Company could have been incorporated as a corporation *de jure* cannot be successfully disputed.

The execution of the amended articles of incorporation, which included all of the old articles of incorporation by reference, and their subsequent filing with the secretary of state and the county clerk of Douglas county are strong indication of a *bona fide* attempt to organize a new corporation under the law. An organization meeting was held, officers elected and regular meetings of the board of directors held. Clearly, an apparent attempt was made to organize under the law. Their organization may have been imperfect, although we are not holding that it was, so that upon a *quo warranto* they could not show a sufficient compliance with the law to justify the exercise of corporate powers, but, as to parties dealing with them, and as to each other, they are estopped to deny that they are what they held themselves out to be.

Whether or not there was a colorable compliance with the requirements of the law is often treated by the authorities in connection with the fact as to whether there had been a *bona fide* attempt to organize. Suffice it to say that color of apparent organization under some charter or law does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will create

a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure;* but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*. *Finnegan v. Noerenberg*, 52 Minn. 239. The facts in the case already detailed in this opinion are sufficient to show that there was a user of corporate power by the James J. Parks Company. It did everything that was consistent with a corporate organization and appellants have failed to point out anything that the company did that was inconsistent with the exercise of corporate power. We therefore hold that the James J. Parks Company was "at least a *de facto* corporation." The judgment of the trial court in dismissing appellants' petition is therefore correct and the same is hereby

AFFIRMED.

LESLIE O. MOORE, APPELLEE, V. PACIFIC MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 29, 1935. No. 29214.

1. Insurance: CONTRACT: CONSTRUCTION. "A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured." *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841.
2. ———: ———: ———. When a policy insures one in a case of disability resulting in "continuous, necessary and total loss of all business time," such disability is found when the insured is unable to perform the substantial duties of his business, even though he may be able to perform some of the inconsequential duties pertaining thereto.
3. Instructions complained of analyzed and *held* free from prejudicial error.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Brogan, Ellick & Shoemaker, for appellant.

Kennedy, Holland & De Lacy, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOSS, C. J.

Defendant appeals from a judgment of $6,078.16 on two policies of insurance in which defendant agreed to pay plaintiff on each policy $250 a month, except for the first three months of any period of disability, for (a) disability resulting from bodily injury effected through accidental means, (b) disability resulting from sickness, (c) "disability, in both cases, to be such as will result in continuous, necessary and total loss of all business time," (d) "no indemnity is payable under this policy for the specified first part (three months) of any period of disability."

The two policies are identical in their terms and provisions and were issued in 1923, six months apart. Two suits were brought on each policy, covering two separate periods of time. Both for trial and appeal the four actions were consolidated.

Plaintiff's occupation was that of an undertaker, actively managing and directing funerals and all things incidental thereto. He alleges that on June 4, 1931, he became ill with influenza and la grippe; was confined to his bed during the month of June, and on July 7, 1931, while convalescing from his illness, fell and injured his right knee; that as a result of this injury he became afflicted with arthritis, affecting various parts of his body; that he later became afflicted with endocarditis, and that as a result he was unable to follow his occupation to such an extent that his disability resulted in continuous, necessary and total loss of all business time from June 4, 1931, to September 4, 1932. The verdicts, on which judgment was entered, appear to be computed on that basis. By answer defendant appropriately raises the issue that at no time did plaintiff suffer disability from accidental means, sick-

ness or otherwise resulting in continuous, necessary and total loss of business time for a period of three months.

The assignments of error may be grouped so as to be disposed of by the answers to two questions: Was there sufficient evidence to sustain the verdict? and was the jury erroneously instructed?

To recite the evidence at length is unnecessary. Before his illness in June, 1931, plaintiff was a very active man, evidently well physically. On May 29, 1931, he called a doctor who diagnosed his case as that of a grippe infection and ordered him to bed for two or three days. After that, though still sick, he was up and around parts of most days until June 7, 1931, when he struck his knee on a concrete step at his mortuary at 3210 Farnam street. The same doctor was called and bandaged the knee, applied heat and prescribed internal medicine to ease his pain. The doctor testified he saw the patient practically every day for months. About two weeks after the injury, the joint began to swell and to show signs of inflammation, the patient had a low-grade fever, that is, a temperature of 99 to 101, "and it became perfectly apparent that he had developed an arthritis on his injury."

Arthritis is defined by Webster as "inflammation of the joints." In this case it began in the right knee. The infection then present was lit up by the trauma occurring when plaintiff fell and struck his knee. Later it spread to other joints—mostly in the lower extremities. It developed in the right ankle, in his big toes, in the left ankle and left hip, in the lower vertebræ and to a slight extent in two or three of his fingers. This spreading of the infection followed the customary course. It did not occur all at once, but progressed from one joint to another as the infection first present in the knee was liberated and found haven in other places.

The joint affected by arthritis goes through an acute stage of swelling and inflammation, which is very painful, and, after this stage subsides, there has been some overgrowth of bone in the joint. If the "overgrowth of bone

has been sufficient and motion is not started and kept up actively, this overgrowth of bone will permanently lock the joint," his physician testified. In other words, ankylosis or obliteration of the joint space by fibrous or bony tissue will occur. Knowing this, his skilful physician, to bring about a recovery, recommended "plenty of rest every day, continuous heat (applied by an electric baker), as often as he could, applied to the joints, * * * attempt to get up on crutches, begin to move around and get some motion in those stiffened joints." "We advised him to try to get out in his car, and to get all the fresh air he could, and to get all the motion, within the limits of his pain, that it was possible for him to do. Furthermore, he was so depressed mentally that it was necessary that he have some diversion, or I don't know what would have happened to him."

Following this advice, he got around on crutches, managed to pull himself into a car and ride. Later he got so he could drive a car in a way by using his left foot on the clutch and brake. But he tired easily. Uusually he remained in bed that first summer until the middle of the day and would go out about two hours in the afternoon, going some place to occupy his mind, sometimes to his office, then to bed until dinner time, after which he would go to bed early. In September, 1931, he went to California, where his parents lived, and lay on the sands of the seashore and bathed in the salt water, absorbing the violet rays which are helpful in treating arthritis. He remained in California for a month or so and returned to Omaha. After Christmas he made a trip to Excelsior Springs on the doctor's orders to get the hot packs and mineral water. He remained there about three weeks. In March, 1932, he made another like trip to Excelsior Springs. Early in June he went to Idaho Springs and Manitou, in Colorado, on the doctor's orders, where he received at a sanitarium about the same treatment as at Excelsior Springs. He still wore metal supports on his spine, ankle and knee and used either his crutches or, on level places, a cane. He did

not cease to use a cane until months after he admits going back and taking charge of his business in September, 1932. While plaintiff frankly admits doing certain little things while at his place of business that were connected with its prosecution, he denies doing any substantial work connected therewith at any time within the period of his claimed disability.

Evidence was produced, in addition to his admitted acts, tending to show that he attended some funerals and participated in them, especially during the first three months of his alleged disability, but also at later periods, which, if accepted under the rules of law invoked by defendant, would prevent a cause of action accruing in favor of plaintiff. This evidence tended to prove that plaintiff, while at his downtown place of business, made engagements over the telephone with parties who desired service, showed caskets, took data for notices to be inserted in the newspapers, arranged for his business to secure a minister or music, signed checks, and did other things of a nature like those described; and that plaintiff attended several funerals in which he assisted in taking care of the bereaved and the friends who attended and that he performed other services that were really a part of the business. Plaintiff's evidence tended to show that he either attended these funerals in the capacity of a close friend of the deceased and did nothing relating to the business, or, if he did anything, it was so insubstantial as not to affect the contract of insurance. We do not deem it necessary to take the space to detail this evidence, but think it sufficient to say that it was a question for the jury to decide, under proper instructions, whether plaintiff made a case or whether this evidence introduced by defendant constituted a sufficient defense to the action. Whichever way the jury decided would necessarily call for affirmance here unless there was error in the instructions, or elsewhere. It was not erroneous to overrule defendant's motion to direct a verdict for defendant. There was evidence amply sufficient to submit to the jury and to sustain a verdict. We do not

think this case is ruled, as claimed by defendant, by *Coad v. Travelers Ins. Co.*, 61 Neb. 563, wherein the policy provided that it was for indemnity resulting from an accident that shall "wholly disable him from transacting any and every kind of business pertaining to his occupation." Coad was insured as a "capitalist," he received an injury to a finger, was not prevented a single day from attending his office as usual and could do and did do practically everything as before, except to write letters, of which he had few and was in the habit of dictating some of them.

The case is controlled rather by the principle of the rule in *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, where the insurance contract provided indemnity for one disabled by bodily injury if the insured "will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations." Plaintiff, formerly a cook, was able to use a telephone and solicit orders for the sale of merchandise. The court announced the following rules:

"A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.

"Total disability, preventing the insured from pursuing a gainful occupation, exists when the injured party is unable to perform the substantial duties of a given occupation.

"One may be totally incapacitated to pursue a gainful occupation, although he may be able to perform some of the inconsequential duties appertaining thereto."

Defendant quotes in his brief, and argues that it was erroneous for the court to give the middle sentence of what we quote from the court's instruction No. 5:

"You are instructed that the above language quoted from the policy does not mean that the policyholder must be rendered absolutely and literally unable to perform any part of his occupation in order to recover under the policy. It is sufficient if plaintiff has proved to you by a

preponderance of the evidence that he was physically incapable, in the exercise of ordinary prudence, of performing any substantial part of the duties necessary to a practical prosecution of his business in substantially the customary and usual manner. The fact, if you find it to be a fact, that plaintiff may have been able, during some or all of the months in question, to perform some of the minor and incidental duties pertaining to his business, does not necessarily deprive him of the right to recover benefits under the policy."

We have copied what went before and what followed after the sentence criticized so that we may have a truer picture of what the jury would derive from the context rather than from the sentence standing alone. This makes it clear to the lay mind as well as to the legal that, if the insured were rendered incapable of performing the "substantial duties" of his occupation, he might recover. This is in line with *Hamblin v. Equitable Life Assurance Society, supra.*

In *Hetzel v. Pacific Mutual Life Ins. Co.*, 108 W. Va. 22, the policy provided a certain sum a month for "continuous, necessary and total loss of all business time" due to sickness. It was there held: "The insured is entitled to recover if such sickness renders him incapable of performing, in substantially his customary and usual manner, all the duties necessary to the practical prosecution of his * * * occupation, disregarding all trivial acts which are not material to the prosecution thereof, but which are merely incidental thereto." Substantially to the same effect is *Pacific Mutual Life Ins. Co. v. Branham,* 34 Ind. App. 243.

In *Pacific Mutual Life Ins. Co. v. McCrary,* 161 Tenn. 389, it was held: "Total disability within the meaning of the law of insurance does not require a state of absolute helplessness, but it is an inability to do the material acts necessary to the prosecution of insured's business or occupation (and substantially all the material acts) in (substantially) his usual and customary manner. One

may still be described as totally disabled, although he is able at intervals to perform certain acts in connection with the former occupation or calling that he pursued"—citing 14 R. C. L. 1315, sec. 491; 1 C. J. 462, and notes, 51 A. L. R. 1048; 41 A. L. R. 1376; 37 A. L. R. 151; 24 A. L. R. 203.

We think the instruction was not misleading nor erroneous.

Appellant claims that instructions numbered 6 and 8 are conflicting and that, one being a correct and the other an incorrect statement of the law, error resulted because the former could not cure the latter. Instruction No. 6 told the jury that if they found any witness had testified falsely they were at liberty to disregard his entire testimony unless corroborated. Appellant approves this rule. Instruction No. 8 was the conventional instruction given for a generation by judges all over the state. Appellant criticizes the last sentence only, which reads: "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so until you find it irreconcilable with other testimony you may find to be true."

Appellant says that this part of the eighth instruction tells the jury they must accept testimony they have found under the sixth instruction to be false because there may be no other testimony on the particular matter and therefore no testimony with which to compare it and decide it "irreconcilable." This is splitting hairs too fine for us to believe the parts could be seen by the jury. Besides, how could they decide that any witness had testified falsely except by comparison of his testimony with other facts testified to or by the implication of other testimony? In our opinion the error assigned is not tenable. The instruction complained of is held free from prejudicial error.

If a man so disabled as the evidence shows plaintiff to have been cannot be permitted to have a verdict by a jury sustained on such a policy as was here sold to

him, and on the evidence in support thereof, it would discredit this type of insurance. We have purposely confined our citations of authorities chiefly to those in which the defendant was defeated on substantially the same principle in various other jurisdictions. The judgment of the district court was right and it is

AFFIRMED.

SCOTTS BLUFF COUNTY, APPELLANT, V. MATTHEW H. MCHENRY ET AL., APPELLEES.

FILED MARCH 29, 1935. No. 29407.

1. **Bill of Exceptions.** Where a bill of exceptions is served within 80 and settled within 100 days, the omission to obtain an order extending the time is waived by an appellee who signs and returns it without proposed amendment and without objection.
2. ———: SETTLEMENT. In such a case, the statute (Comp. St. 1929, sec. 20-1140) limits the time for serving bill of exceptions under any circumstances to 80 days from end of term, and the court is without jurisdiction to settle same after 100 days.

APPEAL from the district court for Scotts Bluff county: EARL L. MEYER, JUDGE. *Motion to quash bill of exceptions overruled.*

Wright & Wright, for appellant.

J. L. Grimm and *Mothersead & York, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

DAY, J.

The appellee has moved to quash the bill of exceptions in this case for that it was not served and settled within the statutory time.

The term of the court at which the judgment was entered was adjourned on October 20, 1934. The bill of exceptions was served January 7, 1935, which was 79 days after the adjournment of the term. There is no order

extending the time an additional 40 days for serving the bill of exceptions.

It is conceded by the appellee that, if the bill of exceptions had not been served within 80 days or had not been settled by the trial judge within 100 days after the term, it should properly be quashed. *In re Estate of Boschulte, ante,* p. 316; *Horbach v. City of Omaha,* 49 Neb. 851; *Lincoln Land Co. v. Commonwealth Oil Co.,* 109 Neb. 652. But it is argued that, where service was made within 80 days and settled by the court within 100 days from adjournment of the term, the failure to obtain the proper order extending the time may be waived by appellee.

In the case of *Omaha & N. N. R. Co. v. Redick,* 14 Neb. 55, it was held: "Where an attorney of record, to whom a bill of exceptions is presented for examination, proposes amendments thereto without objection, he cannot afterwards be heard to complain that it was not presented to him within the statutory time."

In the case of *Cheney v. Cooper,* 14 Neb. 413, the bill of exceptions was served upon the attorney for appellee who made the endorsement, "examined and found correct," and signed and returned it to his adversary. Upon a motion to quash the bill of exceptions, the court held: "That the defendants' attorneys, by not objecting to the bill on that ground, and certifying to the correctness of the same, had waived the objection."

In the case of *State v. Gaslin,* 32 Neb. 291, this court issued a writ of mandamus requiring the trial judge to settle a bill of exceptions which had not been served within the statutory time. It was then said: "There is another reason why the proposed bill should be signed and allowed. It was submitted by the relator to the attorney for the defendants in the suit, on the 24th day of April, 1890, who on May 14, 1890, returned the same to the relator without making any objection either as to its correctness or as to the time it was submitted to him. He therefore waived the objection that it was not served upon him, or presented to the judge for his signature, within the

statutory period." In *Lincoln Land Co. v. Commonwealth Oil Co.*, 109 Neb. 652, this court sustained a motion to quash the bill of exceptions because it was not settled within the 100 days provided by law. It was there held that the trial judge had no authority to settle the bill of exceptions more than 100 days after the expiration of the term, citing *Walker v. Burtless*, 82 Neb. 211. In *Gray v. Elbling*, 35 Neb. 278, the court said: "Upon the facts shown by the record it does not appear that there was an order extending the time to prepare a bill of exceptions or application for an extension of time. There was no authority, therefore, for the judge to sign a bill, and a motion to quash is well taken." From the opinion, we gather the facts that the plaintiff claimed that the time had been extended and moved to correct the record. This was contested as a question of fact by the defendant. The trial court overruled this motion in effect holding "That no such order had been made, and it does not appear that there was any cause whatever for the delay." The trial court refused to extend the time and then settled the bill of exceptions. This court held that this was a finding that there was no cause for delay such as to warrant an extension. The defendant contested the right of plaintiff to have the bill settled and waived nothing. In the case at bar the appellee waived the omission of an order extending the time and there was good cause for the delay, sufficient to require an extension. If the trial court had made an order extending the time when he settled the bill of exceptions, as the language of the opinion indicates he might have done, it is a reasonable inference that this court would then have announced the rule so lately adopted in *In re Estate of Boschulte, ante*, p. 316.

In *Conway v. Grimes*, 46 Neb. 288, the motion for new trial was overruled October 14, 1891, and it was presented to the trial judge for the first time and settled September 24, 1892. The record did not disclose when the term ended at which the judgment was rendered. The court refused to indulge in the presumption that, where a judg-

ment is rendered October 14, 1891, the term did not adjourn until July 23 the following year.

In *Greenwood v. Craig,* 27 Neb. 689, the bill of exceptions was served out of time and no order had been made extending the time. When the bill of exceptions was served, the defendant in error refused to acknowledge service because it was out of time. The court refused to correct the record, upon motion, to make it appear that additional time had been granted. The trial court in effect held that no order extending the time had been allowed. It was not waived by acknowledging service of bill as in this case. This court quashed the bill of exceptions which the trial court stated was allowed for the reason that plaintiff in error "was laboring under the wrong impression that an extension had been granted."

In *Horbach v. City of Omaha,* 49 Neb. 851, the bill of exceptions was presented after the time allowed by statute and was quashed. It was held there that the bill of exceptions could not be presented after the expiration of the second 40 days upon a showing of diligence. Incidentally, counsel proposed no amendments, but objected to the allowance of the bill because out of time. Nothing was waived here.

The present statutory provision is found in section 20-1140, Comp. St. 1929, as follows: "The party excepting must reduce his exceptions to writing within forty days from the adjournment *sine die* of the term of court at which judgment is rendered or at which the motion for a new trial is ruled on, and submit the same to the adverse party or his attorney of record for examination and amendment if desired." It is also there provided: "In cases where a party seeking to obtain the allowance of a bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time herein allowed, but not beyond forty days additional to that herein provided, making

such specific directions in that behalf as shall seem just to all parties."

The design of this statute is to allow a fixed time within which a bill of exceptions must be presented to the adverse party and be submitted to the trial judge for settlement. The cases are now in substantial accord that the bill cannot be served after 80 days and cannot be settled after 100 days. As stated in *In re Estate of Boschulte, ante*, p. 316, the earlier cases were somewhat lax in maintaining the statutory limit, but in recent cases this time has been held jurisdictional. It is not our intention to modify this rule which has now become so well settled.

However, the circumstances in this case reveal that the bill of exceptions was served on the appellee on the seventy-ninth day; that no objection was made that it was not served in time; that it was returned within four days without any proposed amendments, and was settled by the trial judge on the ninety-seventh day. At the time it was served, or the seventy-ninth day, the trial court could have entered an order allowing up to 80 days to serve it.

On the fifty-sixth day after the term, on December 15, 1934, there was filed in this court a stipulation that the bill of exceptions had not been completed, which delay was not due to any fault of the parties, and agreed on an extension of brief day.

All the circumstances in this case indicate that the appellee waived the failure of the appellant to obtain a proper order extending the time for service of the bill of exceptions. If the omission had been called to the attention of the trial court at the time it was served, the seventy-ninth day, an order allowing an extension of 40 additional days would undoubtedly have been made. A comprehensive examination of our former decisions discloses that they contain language that cannot be entirely harmonized. However, there seems to be a distinction which can be drawn from the facts of the various cases. The rule announced in each case relates to and must be read in connection with the facts. We are constrained to

hold in this case that where a bill of exceptions is served within 80 and settled within 100 days, the omission to obtain an order extending the time is waived by appellee who signs and returns it to appellant without proposed amendment and without objection.

In such a case, the statute (Comp. St. 1929, sec. 20-1140) limits the time for serving bill of exceptions, under any circumstances, to 80 days from the end of the term, and the court is without jurisdiction to settle same after 100 days. We are of the opinion that this rule is not diametrically opposed to any announced in any previous decision.

We are influenced in our conclusion somewhat by the fact that it is stipulated that the failure to serve the bill of exceptions within the first 40 days allowed was through no fault of the parties. In this state of the record, the appellant would be entitled to a new trial. In *Mathews v. Mulford*, 53 Neb. 252, it was held: "A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time."

Section 20-853, Comp. St. 1929, provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." This is not construed to mean that the jurisdiction of the court may be extended beyond that given by section 20-1140, Comp. St. 1929, but where the error does not affect the substantial rights of the adverse party and where technical compliance was waived, as in this case, the bill of exceptions will not be quashed.

MOTION OVERRULED.

INDEPENDENT STOCK FARM, APPELLEE, V. W. W. STEVENS, APPELLANT.

FILED MARCH 29, 1935. NO. 29143.

1. Waters: ACCRETION. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by the contiguous waters.
2. ———: ———. The right of title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached.
3. ———: ———. When land has been definitely formed by accretion, and is permanent in character, having upon it willow and cottonwood trees, the subsequent cutting of a channel through such accretion land by a small creek does not affect the ownership thereof.
4. Trial. When the trial court goes upon the premises in controversy, and makes a personal examination of the topography of all of the land and water involved, his findings in reference thereto are entitled to great weight.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

George W. Leamer, for appellant.

Sidney T. Frum and *Henderson, Hatfield & Wadden, contra.*

Heard before ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

PAINE, J.

This is a suit to quiet title to accretions to riparian lands in Dakota county, and to enjoin entry thereon. From a decree for plaintiff, the defendant Stevens appeals.

The plaintiff, a Nebraska corporation, claims that it is the owner of certain lands in Dakota county along the Missouri river, and asks that the title to these lands be quieted in it as against the claims of the defendants. It further asks that the defendants be permanently enjoined

from entering upon or asserting title to said lands. A temporary injunction was issued by the district court in accordance with the prayer of the petition.

After a special appearance and certain motions had each been overruled, the defendants filed their answer, denying the allegations of plaintiff's petition, and asserting that the plaintiff has never cultivated, pastured, or been in possession of any of the lands claimed in its petition, nor made claim to such lands prior to filing its petition in this case, at which time it forcibly took possession by moving a building thereon and having an agent go upon the land, who shot at the defendants with a high-powered rifle, driving them from the land, and ask that plaintiff's petition be dismissed.

For its reply, plaintiff denies that the case of *O'Connor v. Petty*, 95 Neb. 727, involved the title or the possession of any part of the land involved in this suit, and no part of the land involved in the instant case was therein determined to be in the state of Iowa; that neither the plaintiff nor any of its grantors were parties to said suit, and are therefore not bound in any way by the decision therein.

Plaintiff further alleges that the defendants have never been in possession of any part of the land described in plaintiff's petition, except as trespassers upon a small part thereof, and plaintiff claims to be the owner and in possession of every part thereof.

To state the contentions more briefly, the pleadings set out that plaintiff claims the land in controversy in the instant case because it is accretion to its riparian land. The defendants, on the other hand, as one of their defenses, claim that this court, by the decision in *O'Connor v. Petty, supra*, decided that all of the land which defendants have been cultivating and pasturing is in the state of Iowa, and therefore this court has no jurisdiction thereof.

Among the errors set out by the defendant for reversal may be mentioned: That the court erred in finding it had jurisdiction over the land in controversy, and in finding

that the land in controversy was accretion land to plaintiff's land, rather than to defendant's land, and in finding that plaintiff had legal title thereof.

Many references are made in the briefs to a certain Omaha creek as the dividing line between the states of Iowa and Nebraska, but we are unable to find that this creek was mentioned, or declared to be the boundary line, in our decision of *O'Connor v. Petty, supra,* as the defendants claim.

The Missouri river often changes its course by avulsion, as it did in 1894. This means that, suddenly, or by violent action of the elements, it leaves its old channel and creates a new one. In such cases the original thread of the stream continues to mark the limits of the two estates, and land which is so cut off can be followed and identified, and its title remains in the original owner. *Nebraska v. Iowa,* 143 U. S. 359; *Attorney General v. Bay Boom Wild Rice & Fur Co.,* 172 Wis. 363; *Harper v. Holston,* 119 Wash. 436; *De Long v. Olsen,* 63 Neb. 327.

On the other hand, the land in controversy is claimed by accretion, which is a different process. The leading case upon this subject of accretion is *Gifford v. Yarborough,* 5 Bing. (Eng.) 163, 130 Eng. Rep. (Reprint) 1023, decided in 1828, in which the House of Lords had before it a question involving the ownership of land which had been added along the shore of the sea, which question was stated by Chief Justice Best as follows: "A certain piece of land, consisting of about 450 acres, by the slow, gradual, and imperceptible projection, alluvion subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and imperceptibly, * * * deposited * * * in, upon, and against the outside and extremity of said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the crown or to A., the owner of the said demesne lands?" After an interesting discussion of the ancient and modern law, it was held: "Land, not

suddenly derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown."

It is difficult to improve the definition given in the English case referred to, and yet it must be shortened for ordinary use. Accretion is the process of gradual and imperceptible addition of solid material called alluvion, thus extending shore line by deposits made by contiguous waters. Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. *Bigelow v. Herrink,* 200 Ia. 830; *Hanson v. Thornton,* 91 Or. 585; Farnam, Waters and Water Rights (1904) 324; *Haney v. Hewitt,* 105 Neb. 746; *Jefferis v. East Omaha Land Co.,* 134 U. S. 178; 12 Neb. Law Bulletin, 385; 1 R. C. L. 226, sec. 1.

All states do not agree as to the ownership of land along navigable streams like the Missouri river. In Nebraska this court, after the rehearing in the case of *Kinkead v. Turgeon,* 74 Neb. 580, 7 L. R. A. n. s. 316, 13 Ann. Cas. 43, held that riparian owners are entitled to the possession and ownership of the soil formerly under the waters of such a stream as far as the thread of the stream, while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such stream owns only to the shore line. *Haight v. City of Keokuk* (1856) 4 Ia. 199; *Payne v. Hall,* 192 Ia. 780. So that if an island occurs in the Missouri river on the Iowa side of the thread of the stream, it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner.

In the instant case the weight of the evidence indicates that there has been a gradual accretion of land to that of the plaintiff, beginning shortly after the avulsion of 1894 and amounting to a very considerable tract of land. Upon this made land, willows and cottonwoods took foot and grew, and in time grasses were found there, making it

useful for pasture; however, very little of it is yet adapted to farming.

The evidence further shows that what is known as Omaha creek emptied into the Missouri river in years past, after following around the old river bed at a point far to the northeast of plaintiff's high bank, and after the land claimed by accretion as a part of the plaintiff's holdings had been deposited out from and attached to the land of the plaintiff; then the waters of Omaha creek at a later time came down through this accretion land.

The evidence clearly sustains the claim that the formation of the accretion land had gone on to a considerable extent before this little creek cut down across it. In our opinion this does not render void the plaintiff's just claim to this land so formed. We are supported in this holding by several cases, among them *Dowdle v. Wheeler,* 89 S. W. 1002 (76 Ark. 529) which holds: "Where an accretion was begun by a deposit against the shores of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the owner of the mainland."

This court cannot overlook the fact that the trial court in the instant case went upon the land and made an examination of the topography of the many points in sharp dispute in this case. When the court is trying a case without a jury, it is proper for the court to view the premises for the sole purpose of aiding the court in rightly applying the evidence, but of course the decree cannot be based solely upon such information. 26 R. C. L. 1085, sec. 90; *Moore v. Ryan,* 188 Ind. 345. Although some cases have held this to be in the nature of independent evidence. *Cutting v. Vaughn,* 182 Cal. 151. And if the question is for experts, the court will not consider impressions gained on view as against the opinions of the experts. *Wall v. United States Mining Co.,* 232 Fed. 613.

In one case, where a rival dressed his store front in close imitation of another in several striking features, it

was said: "A store front cannot be brought into court, and so the court is obliged to go to the store front." *United Cigar Stores Co. v. United Confectioners,* 17 A. L. R. 779 (92 N. J. Eq. 449). This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight. *Shavlik v. Walla,* 86 Neb. 768; *Chapin v. Village of College View,* 88 Neb. 229; *Keim v. Village of Bloomington,* 119 Neb. 474.

This instant case involves such a close contest over so many points in dispute that the view of the land and water made by the trial court placed it at a vantage point we do not have in passing upon the disputed questions.

The court finds that the defendants, or some of them, after the year 1928, entered upon a portion of said accretion land of plaintiff and cultivated a part thereof, but the evidence shows that no part so used was inclosed, and the defendants have no right or title of any kind to such accretion land.

The court finds that, at the time of filing suit in this case, the plaintiff was in possession of all of the land in controversy, and the title thereto is hereby confirmed in the plaintiff, and the defendants are hereby enjoined from claiming title to, or possession of, any of said land.

The decree of the trial court was right, and is hereby

AFFIRMED.

WILLIAM LUENENBORG, APPELLANT, V. BERTHA LUENENBORG ET AL., APPELLANTS: HENRY LUENENBORG ET AL., APPELLEES.

FILED MARCH 29, 1935. No. 29169.

1. **Wills:** CONSTRUCTION. The object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, and considering the circumstances under which it was made.
2. **Homestead.** A 160-acre tract of land cannot be occupied by two families so that each will have a homestead right thereto.

3. ———. A father may have a homestead right in an entire 160-acre tract of land which he owns, and upon which he lives with his wife, although his son, who farms a large portion thereof as a renter, lives with his family in another set of improvements upon the same 160-acre tract.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed as modified.*

Fischer, Fischer, Fischer & Fischer and *De Lamatre & De Lamatre,* for appellants.

Bryce Crawford, Jr., contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

PAINE, J.

This is a suit for the construction of a will, arising because of errors in the description of the real estate.

At the beginning of the trial a stipulation of facts was entered into, as follows: "It is stipulated by and between the parties hereto that Henry Luenenborg, Sr., is dead, that the heirs are correctly named in the petition; that the testator was the owner of the northwest quarter of section 2, township 14, range 11 in Douglas county, Nebraska, and the same was all of his real estate at the time of his death; that Bertha Luenenborg, defendant, is the testator's widow; that she has elected to take under the statute and not under the will in the probate proceedings in the county court of Douglas county, Nebraska, and is vested with an undivided one-fourth of the real estate in fee simple by virtue of her said election, she being a second wife and not the mother of all the children of the testator; that the will of Henry Luenenborg is correctly set forth in the petition, and is hereby made a part of the record in lieu of the original will."

The evidence discloses that the testator, the owner of the 160 acres of land described above, had lived on this land for about 20 years, although he had owned the property for 30 years. This whole 160-acre tract was farmed

by one of his sons, and rent paid therefor, the father assisting in farming. There were two sets of improvements on the farm. One near the northwest corner, where the father, being the testator, lived, consisted of a house, a barn, a chicken house, and a toilet, which was all fenced in to keep the chickens, horse, and cow off the rest of the farm. The son occupied a complete set of farm buildings, located in the northeast part of the quarter. The testator had been married twice, and there were twelve children by the two marriages.

The deceased having sent word that he was sick and wanted to make his will, an old friend and distant relative, Rudolph Blum, brought out a typewriter and a blank form for a short will, being written on blank No. 76 of the Huffman's General Supply House, and putting this blank in the typewriter he drew up a will, which was duly signed by the testator. All of the discussion between the scrivener and the testator was in the low German language. Certain evident errors were made in writing the will, upon which this appeal is based. Some errors may be due to the fact, as testified by the scrivener, that he is not fluent in the use of the English language. In explaining the drafting of the will, he testified: "I wrote it down as he said it, and afterwards I said, have you got a tax receipt so we can get the description? He said, I don't need any, I will give you the description right out of my mind, and that is the way I put it down, the way he told me."

The second paragraph of the will, being the first which is in dispute, reads as follows in the photostatic copy of the original will as attached to the briefs: "To my wife Bertha Luenenburg, the west ½ of Sec. two township Fourteen and Range Eleven North west Quarter, to have and to hold until her death, then to be divided equally amonst the children." This clause is in controversy for the reason that it gives to the wife the west half of the section, when the testator only owned the northwest quarter thereof. The words "northwest quarter" are inserted out of the place where they should be, and there is a state-

ment in the testimony of the scrivener that that portion of the description would be given toward the last of the sentence in speaking in low German, and that he wrote it down just the way it was given to him. In this opinion it is not necessary to pass on this disputed clause since the widow elected to take under the law rather than under the will, and being the second wife of the testator she is entitled under the law to a fee title to an undivided one-fourth interest therein.

We come now to the clause reading as follows: "To Henry Luenenburg Jr. I bequeath the east ½ of Sec. (2) two (14) Township. Range (II) He is to pay Ten (10) Dollars each year To Mary, Tena, Anna, John, Will, and Frank, Luenenburg, as long as they are alive." This clause gave the trial court, as well as this court, considerable difficulty.

In the stipulation it is set out that the testator owned all of the northwest quarter of section 2, and that he did not own any other real estate. If the widow had not elected to take under the law, we have shown that the fact that the words "northwest quarter" were placed out of their usual order would not have interfered with reaching the conclusion that the testator intended to give the widow the west half of his northwest quarter, and this would leave, as the only land that the testator could have in mind, the east half of that northwest quarter, being all of the land that he owned after giving the widow the west half of the same quarter.

It is one of the rules for construing a will that the intention of the testator, as manifested by the words of the writer, in connection with all the surrounding circumstances, must be carried into effect, provided that in so doing no rule of law is violated. *Worley v. Wimberly*, 99 Neb. 20. It has further been held that it will be presumed that the testator intended to dispose of his entire estate unless the contrary is apparent from the will itself. *Jones v. Hudson*, 93 Neb. 561.

In the case of *Pemberton v. Perrin*, 94 Neb. 718, Ann.

Cas. 1915B, 68, this court had before it a will which described 40 acres of land as lying in range 9, which the testator did not own, and parol evidence disclosed that he did own the identically described 40 acres of land lying in range 10, and it was held that the testator's intention was to devise the land that he owned, and that the mistake of inserting "9" instead of "10" was the mistake of the scrivener who wrote the will. See *Will of Boeck*, 160 Wis. 577, L. R. A. 1915E, 1008; *Seebrock v. Fedawa*, 33 Neb. 413.

In the case at bar, the scrivener says the testator told him that he owned the northwest quarter, and that he wanted the west half to go to his wife and the east half to go to Henry Luenenborg, Jr. It is argued by the appellants that the lower court erred, both in admitting this testimony of the scrivener and in inserting words into an unambiguous clause in the will which were not there, insisting that the trial court apparently attempted to arrive at the supposed intent of the testator, and that parol evidence is not admissible to supply omissions in a will. *Taylor v. Maris*, 90 N. Car. 619.

We have a very recent decision in which this court has rejected testimony of the scrivener showing that the testator intended to insert in a paragraph the name of his wife, and held: "Where a testator, in a clause of his will devising real and personal property, omits the beneficiary either by name or by any other reference, and nowhere in the will is there any means of discovering the identity of the intended beneficiary, parol or extrinsic evidence cannot be received to determine that fact." *In re Estate of Wirsig, ante*, p. 297. However, this decision does not interfere with our holding in this case, for the reason that, considering the language in which the terms of the will were dictated by the testator, and considering all of the paragraphs in the will itself, it is not difficult to find within the four corners of the will that the testator intended to devise all of his property, giving the west half of it to his wife and the east half of it to his oldest son, and the

object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the language of the will itself, and considering the circumstances under which it was made. *Herter v. Herter,* 97 Neb. 260.

In our opinion the trial court committed no error in finding that the will in the instant case passed the east half of the northwest quarter of section 2, township 14, range 11, to the appellee, Henry Luenenborg, Jr.

In the second portion of the paragraph under consideration a provision is made that $10 is to be paid by Henry Luenenborg, Jr., each year to certain named brothers and sisters as long as they live. It was held by the trial court that this provision created no charge against the land bequeathed in this paragraph under the rule of law that lands specifically devised are not liable for the payment of annuities unless they are charged thereon by the will, and that this provision charged Henry Luenenborg, Jr., personally with the payment of said annuities, but were not a charge against the land. In this holding we believe the trial court was right.

In the decree of the district court it is directed that the widow is given homestead rights in simply the five-acre tract of ground in the northwest corner of the northwest quarter of said section 2 upon which the testator and his wife resided at the time of his death. In *Meisner v. Hill,* 92 Neb. 435, it was held that a homestead in Nebraska under section 40-101, Comp. St. 1929, which descends to a surviving spouse, consisting of the dwelling-house and 160 acres of land, and not exceeding in value $2,000, is exempt from judgment liens, and in the last mentioned case it was held that the limitation on the value of $2,000 is solely for the purpose of fixing the rights of creditors, and as no creditors are involved in the case at bar it is insisted by the appellant that the widow is entitled to the homestead rights in the entire 160 acres of land instead of the five-acre tract.

In *Whitford v. Kinzel,* 92 Neb. 373, where the wife owned 80 acres of land, upon which there was a dwelling,

and the husband owned the adjoining 80 acres, the farm being operated as a whole, it was held that, as there were no rights of creditors involved, the whole 160 acres constituted the family homestead.

In the case of *Davis v. Davis,* 112 Neb. 178, it was held that, even though a section line divided two tracts into different subdivisions under the government survey, yet as the tracts were farmed as one farm, they would constitute one homestead.

It is contended by the appellees that the five-acre tract in the northwest corner of this quarter-section of land where testator lived being fenced indicated that he had selected that five-acre tract as his homestead, and that his selection thereof controls the court. On the other hand, it is contended by the appellants that the testator considered the whole northwest quarter as one farm, and operated it as such through renters which he placed thereon. We do not find in the bill of exceptions any evidence to show that it was at any time the intention on the part of the testator to set off this small five-acre tract as his homestead. The renter, Emil Luenenborg, a son of the testator, testified that, while he lived in the old set of improvements on the northeast corner of this 160-acre tract, and had farmed the land as his father's renter, yet his father retained entire control over the land, decided what crops would be planted and just where they would be planted, and also assisted him whenever he was able. He further testified that the small amount of ground fenced off around his father's buildings in the northwest corner of the 160 acres had not always been the same land as fenced in at the time of his father's death, but that this fence had been changed from time to time, according to the convenience of his father, and it was also shown that the hay and grain necessary for the father's horse and cow and chickens were brought directly from the field to his father's barn.

"It is frequently said that occupancy must be exclusive. It is true that a homestead cannot be occupied jointly by two families so that both will have homesteads therein.

Also, it is true that if a tenant in common claims a homestead, he must occupy the property to the exclusion of his cotenants. But the use of the phrase 'exclusive occupancy' is unfortunate, for it is not true that all of the premises claimed as homestead must be occupied by the claimant and his family. Thus in *Guy v. Downs* (12 Neb. 532), where a barn was leased to others, Judge Cobb declared: 'It is neither within the letter or the spirit of the statute that occupancy of the homestead by the debtor should be exclusive,' and pointed out that if such a requirement was enforced, in order to preserve homestead rights, parts of the premises might have to remain idle and be of benefit to no one. In *Hess v. Eselin* (110 Neb. 590), a claimant occupying one apartment of an apartment house owned by him was held to have a homestead right in the whole house." From article on "Homestead" by Dean H. H. Foster, 3 Neb. Law Bulletin, 130.

In our opinion the testator at the time of his death had a homestead right in and to the entire 160-acre tract, although his son, who farmed the same, occupied with his family another set of buildings thereon.

It is, therefore, the opinion of the court that that part of the decree of the trial court limiting the homestead of the widow to the five-acre tract be set aside and held for naught, and it is directed that an order be entered setting aside to the widow a homestead right in the entire northwest quarter of section 2, township 14, range 11 east, in Douglas county, Nebraska, and as thus modified that the decree of the trial court be affirmed.

AFFIRMED AS MODIFIED.

JESSE F. BEJOT, APPELLEE, V. AINSWORTH LODGE NO. 130, INDEPENDENT ORDER OF ODD FELLOWS, ET AL., APPELLANTS.

FILED MARCH 29, 1935. No. 29191.

1. **Beneficial Associations: POWERS.** An incorporated fraternal society, organized under section 24-607, Comp. St. 1929, has

power to purchase real estate for its corporate purposes and to borrow money and mortgage such property to secure the loan.

2. ———: MORTGAGES: RATIFICATION. Where an officer, without authority to do so, executed a mortgage for a corporation that was within the general powers granted to it by statute, and the corporation received and retained the benefits of the mortgage and paid the interest thereon as it became due, it thereby ratifies the contract and makes it good by adoption.

3. ———: CONTRACTS: ESTOPPEL. A corporation having received the benefit of a contract may be estopped to raise the defense that it was unauthorized, where the contract is within its charter powers but there has been a failure to comply with some regulation or the power has been improperly exercised.

4. ———: TRUSTEES. Where a member of a board of trustees of an incorporated fraternal society, with his own money and for his own use, purchased at a discount its outstanding note and mortgage against its corporate property, when he owed no duty to the corporation to purchase for its benefit, he may collect thereon in full from the corporation.

APPEAL from the district court for Brown county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Robert A. Baker and *Hoagland, Carr & Hoagland,* for appellants.

G. A. Farman, Jr., contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

This is an appeal from the district court for Brown county by Ainsworth Lodge No. 130, Independent Order of Odd Fellows of Ainsworth, Nebraska, defendant and appellant, and the Grand Lodge of Nebraska, Independent Order of Odd Fellows, intervener and appellant, from a decree foreclosing a mortgage on behalf of appellee Jesse V. Bejot against certain real estate belonging to the defendant below. As a matter of convenience, Ainsworth Lodge No. 130, Independent Order of Odd Fellows, will hereafter be referred to as the Ainsworth Lodge, and the

Grand Lodge of Nebraska, Independent Order of Odd Fellows, will be referred to as the Grand Lodge.

The record discloses that prior to April 1, 1912, the Ainsworth Lodge was the owner of two lots in the city of Ainsworth upon which it desired to build a new lodge hall. Application was made to the Grand Lodge for permission to incur a mortgage indebtedness of $10,000 for this purpose and the same was granted. The trustees of the lodge were authorized to construct the building. After using the funds the lodge had in its treasury, amounting to $1,900, the trustees incurred additional indebtedness amounting to $16,934.58. The trustees without authority from Ainsworth Lodge executed a first mortgage on the premises for $8,000. On July 3, 1920, the trustees without further authority executed a first mortgage upon the property to S. A. Rickenback for $8,000 and a second mortgage to the Citizens State Bank of Ainsworth for $8,800. On September 6, 1924, without additional authority, the trustees executed a first mortgage upon the lodge property to Charles Meyers for $8,767 and two second mortgages of equal priority, one to Charles Meyers for $5,838, and the other to J. D. Cook for $3,502.80. On September 6, 1929, the board of trustees without further authority from the lodge made and executed an extension agreement of these mortgages for a period of five years. The appellee became the owner and holder of the second mortgage originally given to Charles Meyers, in March, 1931. The owner of the first mortgage was brought into the case by order of court and a decree of foreclosure was entered in his behalf from which no appeal was taken. The executor of the estate of J. D. Cook failed to plead and a default was entered against the estate. The trial court found appellee's mortgage to be a valid second lien and decreed a foreclosure thereof in the amount of $6,984.15. From the decree of the trial court, holding appellee's mortgage to be valid and ordering the foreclosure thereof as a second lien, the appellants have appealed.

It is undisputed that the Odd Fellows fraternity is com-

posed, in part, of the Sovereign Grand Lodge, which is the supreme legislative and judicial branch of the order and issues charters to the Grand Lodges of the various states. The Grand Lodge has no powers except those derived from the Sovereign Grand Lodge and is entirely under the control and jurisdiction of the Sovereign Grand Lodge. Under the laws of Nebraska, section 24-607, Comp. St. 1929, the Grand Lodge of Nebraska and the Ainsworth Lodge are made corporations. The Grand Lodge issued a charter to Ainsworth Lodge more than fifty years prior to the date of the commencement of this suit. Ainsworth Lodge had no power to own real estate except for its lodge home and all its moneys and funds are trust funds for the charitable purposes of the order. Upon the surrender of the charter of a subordinate lodge, the Grand Lodge becomes the owner of all the property of the subordinate lodge as a trustee to carry out the charitable purposes of the fraternity. It was upon the theory that the Grand Lodge has a reversionary interest in the property of Ainsworth Lodge that the Grand Lodge claimed an interest in the litigation and intervened therein. The statutes of Nebraska provide that an incorporated subordinate lodge may hold real estate in its name if it files a copy of its charter or constitution in the office of the county clerk of the county where the lodge is located. Comp. St. 1929, sec. 24-607. This was never done, and, while Ainsworth Lodge was a corporation, it did not comply with the condition precedent to entitle it to hold real estate in its own name. The laws of the Grand Lodge provide, among other things, that subordinate lodges may hold property "subject to such regulations and conditions, not inconsistent with the laws of the order, as may be prescribed by the respective grand bodies having jurisdiction over them." The laws of the Grand Lodge also provide: "No lodge shall incur any liability or indebtedness for, or on account of, the purchase or erection of any hall building, without first obtaining the consent of the Grand Lodge, or of the executive committee of the Grand Lodge." The by-laws of Ains-

worth Lodge provide: "It shall be the duty of the trustee to take charge of the lodge property not in actual use; to enter into and sign all contracts and agreements of this lodge which may be ordered by a vote of the same. They shall hold in trust for the lodge all real estate, stocks, securities, bonds, mortgages, and investments, and transfer, exchange, or deposit the same or any part thereof, whenever required under the laws so to do: Provided, that no real estate shall be sold or transferred, no security changed, without the consent of the lodge by a two-thirds vote of all the members present at a stated meeting. It shall be their duty to make a report in writing at the second meeting of each term." The appellants contend that the trustees of Ainsworth Lodge were never granted the authority to execute any of the mortgages or extensions heretofore mentioned; that permission was never granted by the Grand Lodge to mortgage the lodge property for more than $10,000; that appellee's mortgage was in excess of the $10,000 mortgage indebtedness authorized and that the execution of the mortgages and extensions was *ultra vires* and void.

The execution and extension of the mortgage in question by the trustees of the Ainsworth Lodge were not *ultra vires* in the sense of being outside the corporate powers of the lodge. The charter of the Grand Lodge did require the subordinate lodge to obtain permission from it to incur the mortgage indebtedness complained of, which it did not do. Also, the by-laws of the subordinate lodge required the granting of authority by Ainsworth Lodge to its trustees before they could execute the mortgage or the extension agreement and this they did not do. These, however, were only regulations of the mode and the agencies by which the corporation should exercise the power granted to it. The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by statute or by its charter, and an act that amounts to an irregularity in the exercise of the granted powers has constantly been recognized by the courts. The

distinction is well set out in the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, as follows:

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

Also, in the case of *National Home Bldg. Ass'n v. Home Savings Bank*, 181 Ill. 35, it was held: "It is also argued that the building and loan association is estopped to raise the question whether the contract was *ultra vires* because it has received the benefit of the contract by the conveyance of property to it. That depends, as we think, upon the sense in which the term *ultra vires* is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract.

For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. Where an act is not *ultra vires* for want of power in the corporation but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons." See, also, *Alexander v. Culbertson Irrigation & Water Power Co.*, 61 Neb. 333; *Federal Trust Co. v. Damron*, 124 Neb. 655.

In the case at bar, the Ainsworth Lodge had the power to purchase and own real estate for a lodge home and to mortgage the same. Comp. St. 1929, sec. 24-607. The regularly appointed trustees, in mortgaging the property without the consent of the Grand Lodge or the authority of the Ainsworth Lodge, certainly acted within the powers granted by statute and charter, however irregular they may have been. The record discloses that the act of the trustees on September 6, 1924, in renewing the mortgage indebtedness of the lodge for five years was, on October 20, 1924, ratified and approved by resolution of the Ainsworth Lodge. The Ainsworth Lodge at all times retained the benefits of the transaction alleged to have been *ultra vires*. The lodge paid its interest regularly and continued to do so after the extension agreement of September 6, 1929, was entered into. That these acts amount to a ratification of the doings of the trustees cannot be successfully refuted. "Very slight circumstances are sufficient to establish a ratification by a corporation of the acts of its officers where

the benefits have all inured to its advantage." *Love v. Metropolitan Church Ass'n,* 184 Ill. App. 102.

The doctrine of estoppel is also applicable to the case at bar. In *Doerr v. Fandango Lumber Co.,* 31 Cal. App. 318, the court held: "Besides the foregoing considerations, it is very clear that the defendant Fandango company having received, retained, and used for the purposes of its business the money, to secure the repayment of which the mortgage was given, is, and upon a familiar equitable principle should be, estopped from denying the validity of the obligation. As shown, it is not disputed that the corporation received the money and used it in the payment of a part of its debts."

We, therefore, hold that the acts of the trustees of Ainsworth Lodge were within the scope of the powers of the corporation granted by their charter and the statutes, that the irregularities complained of go to the mode of exercising the power and not to a lack of power, that under such circumstances the appellee could plead and prove a ratification or an estoppel against the defense that the action of its representatives was unauthorized. A ratification was clearly proved and we hold that appellee's mortgage was a valid second lien on the lodge property secured thereby. Under the undisputed evidence, and the authorities cited, the Ainsworth Lodge is also estopped to deny its alleged invalidity.

The Grand Lodge is in a somewhat different position. It claims an interest in the subject-matter of the suit by virtue of a reversionary interest in the property of the Ainsworth Lodge that would accrue to it as trustee if the Ainsworth Lodge should surrender its charter for any reason. It is the contention of the Grand Lodge that the action of the Ainsworth Lodge in executing a mortgage in excess of $10,000 is *ultra vires* because written permission by the Grand Lodge was given to incur mortgage indebtedness to that extent only, as required by the constitution of the Grand Lodge of Nebraska. Counsel for the Grand Lodge claim that the Ainsworth Lodge was possessed of

property valued at $6,900 at the time the $10,000 mortgage indebtedness was authorized and allege that it is entitled to have the $6,900 paid ahead of the appellee's mortgage even if the mortgage should be held to be a valid lien on the property. To this we cannot agree. The interest of the Grand Lodge is subsequent to all creditors of the Ainsworth Lodge. It having been decided in this opinion that appellee has a valid mortgage lien against the property of the Ainsworth Lodge, the reversionary interest of the Grand Lodge must be subsequent thereto, unless the provision of the constitution of the Grand Lodge providing that written permission of the Grand Lodge must be obtained to incur the indebtedness would change the result. The argument advanced is that the provision of the Grand Lodge constitution has the effect of rendering the mortgage and extension agreement in question void as being without the charter powers of the Ainsworth Lodge. We are not of that opinion. The requirement of the provision is not a limitation upon the charter powers of the Ainsworth Lodge, but is in the nature of a rule of action prescribing merely a course or manner of corporate action. Strictly speaking, a corporate act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. The giving of the mortgage and extension agreement was within the scope of the powers of the Ainsworth Lodge. The provision of the Grand Lodge referred to is a mere internal regulation, and as such it does not affect the validity of contracts executed without due observance of its directions so far at least as concerns persons dealing with the corporation without actual or imputed knowledge of the provision of the Grand Lodge constitution. Can it be said that Charles Meyers, the first owner and holder of the mortgage in question, when he took the same from the Ainsworth Lodge was bound to know the provisions of the constitution and by-laws of the Grand Lodge? We think not. A third person, knowing that the transaction was within the general power of the Ainsworth Lodge to per-

form, had the right to assume that any rule of procedure prescribed by the Grand Lodge had been complied with. He was not bound to know of all the special instructions that the Grand Lodge might prescribe by its constitution or by-laws as a means or method for the Ainsworth Lodge to carry out the general powers that it had. One who deals with a corporation is bound to know the general scope of the powers the corporation may have, but he is not bound to know of all the rules, by-laws or constitutional provisions that another corporation, not a party to the transaction, such as the Grand Lodge in the case at bar, may impose.

The argument is made that the Ainsworth Lodge was not a corporation because it failed to file its charter or constitution under which it was working with the county clerk of the county in which it was located. A careful reading of section 24-607, Comp. St. 1929, discloses that Ainsworth Lodge is incorporated by virtue of that section and the requirement that the charter or constitution be filed with the county clerk is merely a condition precedent to its holding title to real estate in its own name. The Ainsworth Lodge, by holding itself out as having the right to own, hold and convey interests in real estate used for corporate purposes, is estopped to deny that it complied with the conditions precedent thereto. It cannot secure funds by mortgaging its property as a corporation and subsequently refuse payment on the theory that it had failed to follow the proper method of obtaining title in the first instance, and at the same time retain its ill-gotten gains. The Grand Lodge has also treated the Ainsworth Lodge as a corporation entitled to hold title to real estate for lodge purposes in its own name by granting permission to it to incur the $10,000 mortgage indebtedness and it also is estopped to deny that the necessary formalities were taken in order to benefit its reversionary interest. The Grand Lodge has received semiannual reports for many years showing the indebtedness of the Ainsworth Lodge to be in an amount ranging from $15,881 to $18,851. Having

had such knowledge for several years, it is not now in a position to come into a court of equity and say that permission was never given and that it had no knowledge. The evidence is such as to show knowledge by the Grand Lodge and acquiescence therein as to the amount of the indebtedness, although it may not have had knowledge of the giving of the mortgage. A careful reading of the provision of the Grand Lodge constitution shows that written permission to incur the indebtedness is all that is required and we find nothing requiring such permission to execute mortgages to secure the indebtedness. The Grand Lodge has no equity by virtue of its reversionary interest as against the appellee, who stands in the same position as the person who loaned the money to the lodge. The reversionary interest of the Grand Lodge is clearly the interest of the Ainsworth Lodge after the payment of all its just debts, whether secured or not, at the time of the accrual of their interest as trustee. The purpose of the constitutional provision was not to limit the power of the subordinate lodge, as it had the right to own real estate upon which to build a lodge home. Its purpose was to permit a supervisory capacity by the Grand Lodge over the business affairs of the subordinate lodge. The Grand Lodge desired as a matter of policy that its business judgment was to be considered before the indebtedness could be incurred. The Ainsworth Lodge did not comply and the Grand Lodge acquiesced therein. Can it be said that a third person who has complied with his contract must suffer while both the Grand Lodge and the Ainsworth Lodge retain a benefit? It is clearly inequitable. The Ainsworth Lodge has violated the constitution of the Grand Lodge which it was under obligation to obey, and it may be subject to penalties prescribed by the fraternity for so doing, but the appellee, in a court of equity, is not compelled to take the loss while each of the defendants retains the benefits. The trial court was right in holding that appellee had a valid second lien superior to any claim of the Grand Lodge.

The appellants contend further that if appellee is entitled to a lien on the premises it should not be for the full amount of the mortgage note. The evidence discloses that on April 18, 1931, and for several years prior thereto, the appellee Bejot was a member of Ainsworth Lodge and the board of trustees thereof; that in March, 1931, while such member and trustee, Bejot traded for the second mortgage being sued on in this action at a price claimed to be far less than its face value. The contention of the appellants is that Bejot occupied a fiduciary relation with the appellants and that he had no right to make a profit at the expense of the appellants and that they are entitled to the benefit of any bargain that he may have made.

The evidence is undisputed that Bejot was a trustee of the Ainsworth Lodge at the time he purchased the mortgage and was for many purposes acting in a fiduciary capacity for the members of the Ainsworth Lodge. The record fails to disclose that the Ainsworth Lodge had any special or general fund from which money could have been obtained to purchase or pay the mortgage in question at the time Bejot bought it. Neither was Bejot under any duty on behalf of the lodge with reference to the mortgage at the time he dealt for it. The only difference that the transaction made was that the debt and security belonged to Bejot instead of Meyers. Counsel for appellants cite many cases in support of their contention. Upon examination, we find that they hold in substance that directors, trustees or other officers of a corporation who are entrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the corporation, directly or indirectly, or to sell property to it or purchase property from it, where they act both for the corporation and themselves. We concur with counsel for appellants that this is a proper statement of the law but the appellee in the case at bar does not come within the rule. Appellee dealt with a third person for a mortgage given by the lodge at a time when he was under no obligation to the Ainsworth Lodge regarding the mortgage.

The only question for determination is whether appellee can do this under the circumstances above shown. This proposition was well discussed in the case of *Glenwood Mfg. Co. v. Syme,* 109 Wis. 355, as follows: "The cases all agree that an officer or director cannot rightfully seek and obtain profit at the expense of the corporation or its stockholders, and is bound to manage its business affairs so as to promote the common interests. The rule has been broadly stated by some of the authorities that 'a trustee, executor, or assignee cannot buy up a debt or encumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself.' Perry, Trusts, sec. 428. That is the doctrine sought to be invoked in this case, as applicable to a director regarded as a trustee of the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. The foundation of the rule is that a fiduciary agent, owing a duty to his principal, cannot make a contract for his own benefit which is inconsistent with that duty. It is where there is a collision between trust duty and personal interest that the equitable prohibition applies. The cases usually cited to support the doctrine are where a trustee buys in the property of his principal at a sacrifice for his benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract in behalf of his principal with himself, directly or indirectly, as the other party to the agreement, or where by some secret arrangement he makes a profit directly at the expense of his principal. * * * As before stated, the entire basis of the rule consists in the collision between trust duty and personal interest. Can it be said that any such conflict exists in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations? This is the test to be applied to the facts stated in the complaint. It is nowhere stated whether the notes purchased by Syme were due or not. It is not claimed that any fund had been provided for the payment of these obligations. No special liquidation thereof had

been ordered by the corporation. No fact or circumstance is alleged charging him with a present duty to act for the corporation which would make it inconsistent for him to make a personal purchase of these notes, save that he was an officer and director. On the contrary, it is alleged that the company was embarrassed and without funds to pay pressing demands—not that it was insolvent, but hard up. There was no present duty resting upon Syme to extinguish the notes, so far as appears from the complaint. It is not charged that he neglected any duty he owed to the corporation in not securing funds for their discharge, or that he diverted any of its moneys properly applicable thereto to other purposes. The plaintiff's case rests upon the bald proposition that, being an officer, he could not purchase said notes at a discount. * * * As we construe the complaint, it fails to show any breach of duty on the part of Mr. Syme for which he could be held liable in this action."

In *Inglehart v. Thousand Island Hotel Co.*, 32 Hun (N. Y.) 377, it was held: "So also a trustee or director may, with his own money, purchase for himself of a third person a valid and subsisting outstanding debt owing by the company, and secure a perfect title thereto. Such a transaction is not even the ground for entertaining the suspicion that it is in violation of any duty which he owes the corporation, and there is no presumption of law against its fairness. If the obligation is valid the owner may sell and transfer it to any one who is willing to become a purchaser, and he thereby secures an unquestioned title. * * * The other question to be considered in this connection is, will the trustee or director be permitted to enforce a collection of the debt thus acquired for its entire amount, or shall he be limited to the sum which he actually paid for the debt or obligation. I am unable to discover any good reason why he should not be permitted to enforce payment for the full amount, nor can I find any decision limiting the trustee to the sum actually paid." See, also, *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333; *McIntyre*

v. Ajax Mining Co., 28 Utah, 162; *St. Louis, F. S. & W. R. Co. v. Chenault*, 36 Kan. 51. Appellee clearly falls within the rule supported by the above authorities.

The judgment of the district court is in all respects correct and it is hereby

AFFIRMED.

ANTON F. MUNCH, APPELLEE, V. CENTRAL WEST PUBLIC SERVICE COMPANY, APPELLANT.

FILED MARCH 29, 1935. No. 29217.

1. **Bonds:** ACCELERATION OF DATE DUE. The right to declare the principal due on a bond before the maturity date contained therein, upon a default in the payment of interest, arises only by the terms of the contract.
2. **Corporations:** BONDS: RECITAL AS TO MORTGAGE. The bond of a corporation which recites that it was issued under a certain mortgage, to which reference was made for a description of the terms under which it was issued, is sufficient to incorporate the mortgage contract as a part of the bond.
3. ———: ———: ACCELERATION OF DATE DUE. The provision of a mortgage agreement precluding a bondholder from accelerating the maturity date of his bond because of a default in the payment of interest, unless the trustees shall have refused to take action on request of holders of 25 per cent. of the aggregate amount of the outstanding bonds, is a reasonable and valid provision and, if not complied with, will bar an action to recover the principal amount of the bond.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed and dismissed.*

Crofoot, Fraser, Connolly & Stryker, for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

These are two actions at law to recover judgments on the principal and interest of two $500 bonds issued by the

Central West Public Service Company, one of which was owned by Anton F. Munch, and the other by Paul F. Munch. The cases were consolidated, a jury waived, and tried to the court on a stipulation of facts. Judgments were entered in favor of both appellees and against the appellant, Central West Public Service Company. From an order overruling its motions for a new trial, the appellant brings both cases here on appeal.

These actions were commenced on each of said bonds on April 5, 1933, more than eight months before their maturity date but after defaults had been made in the payment of interest. The question to be determined is whether the maturity date of the bonds can be accelerated by the appellees under the provisions of the bond. If it can be so accelerated, the judgments of the trial court are right; if not, the actions were prematurely brought.

The bonds contain the following provision: "In case of certain events of default specified in the mortgage, the principal of this bond may be declared or may become due and payable in the manner and with the effect provided in the mortgage." By this statement in the bonds, the provisions of the mortgage given to secure the bonds regarding the acceleration of their maturity date is incorporated by reference as a part of the bonds. That the holder of a bond is bound by the provisions of the mortgage under such circumstances is well established by the authorities. In the case of *Pennsylvania Steel Co. v. New York City R. Co.*, 189 Fed. 661, it was held: "A reference in bonds issued by a corporation to the mortgage securing the same puts the bondholders and their trustees on notice as to the terms of the mortgage." Also, in the case of *Crosthwaite v. Moline Plow Co.*, 298 Fed. 466, the court said: "Holders of corporation's notes, referring to trust agreement and stating that the notes were issued thereunder, were charged with notice of all the terms of the agreement." This court has adopted the same view. In *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686, this court said: "A note and a mortgage securing it, made contemporaneously, are

to be construed together. Therefore, where a note is payable on or before a date named and the mortgage contains a provision that in certain contingencies, prior to that date, the mortgagee may elect to declare the whole amount due, *held,* that such provision in the mortgage authorizes the mortgagee upon the happening of such contingencies to proceed not only to foreclose the mortgage but also to enforce the personal liability upon the note." See, also, *Consterdine v. Moore,* 65 Neb. 296, on rehearing. The parties to the transaction, under the conditions herein set forth, are bound by the provisions of the mortgage in determining their rights in a suit at law on the bond.

The right to declare the whole debt due because of a default in the payment of interest arises only by the terms of the contract. That this is a correct statement of the law there can be no dispute. The question is: Did the contract provide that the holder of a bond could accelerate the maturity date of the bond because of a default in the payment of interest? The terms of the mortgage must necessarily be examined to determine this question.

By the terms of the trust deed securing the bonds, it is provided that if default is made in the payment of interest, which continues for a period of 90 days, the trustees, in their discretion, may and, upon the written request of the holders of 25 per cent. of the principal amount of the bond, shall take possession of the property secured by the mortgage and operate the same; that the trustees may accelerate the maturity of the principal amount in case of default, and shall do so upon the request of 25 per cent. of the bondholders.

Section 14, art. XI of the mortgage, then provides: "No holder of any bond shall have the right to institute any suit, action or proceeding at law or in equity upon, or in respect of, this mortgage, or for the execution of any trust or power hereof, or for any other remedy under or upon this mortgage, unless such holder shall previously have given to the trustees written notice of an existing default; nor unless, also, such holder or holders shall

have tendered to the trustees security and indemnity satisfactory to them against all costs, expenses and liabilities which might be incurred in or by reason of such action, suit or proceeding; nor unless, also, the holders of at least twenty-five per cent. in aggregate principal amount of all the bonds then outstanding shall have requested the trustees in writing to take action in respect of such default and the trustees shall have declined to take such action or shall have failed so to do within thirty days thereafter; it being understood and intended that no holder of any bond or interest coupon shall have any right in any manner whatever to affect, disturb or prejudice the lien of this mortgage by his action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of outstanding bonds."

Section 4, art. XI of the mortgage, also provides in part: "In case the company shall make default in any of the respects specified in section 1 of this article, and such default shall continue for the period, if any, therein specified, the trustees may and, upon the written request of the holders of at least twenty-five per cent. in aggregate principal amount of all the bonds then outstanding, regardless of series or maturity, shall, by notice in writing mailed or delivered to the company, declare the principal of all the bonds then outstanding to be due and payable immediately; and upon any such declaration the same shall become and be immediately due and payable, anything in this mortgage or in said bonds contained to the contrary notwithstanding."

It is clear from an examination of these sections of the mortgage that the trustees are permitted to accelerate the mortgage in case of a default, and, in case of written request of the holders of 25 per cent. of the aggregate principal amount of the bonds outstanding, the trustees must do so within 30 days, and upon failure to so do the holder of the bond may then commence his action. It is

not disputed that the trustees have never accelerated the maturity date of the bonds sued upon, nor have the requisite number of bondholders ever requested the trustees to accelerate the principal. Neither have they tendered to the trustees security and indemnity against costs, expenses and liabilities which might be incurred by reason of the commencement of this suit, as required by the mortgage. Under the provisions of the mortgage above set forth, the appellees can claim no right to accelerate the principal. Are the provisions binding? We hold that they are. In the case of *Central West Public Service Co. v. Craig,* 70 Fed. (2d) 427, the court, in discussing this provision of the identical mortgage involved in this suit, said: "This provision is binding on the plaintiffs."

In the case of *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 148, the court, in considering a like case, said: "The principal question involved in this appeal, therefore, is whether the provisions of article nine above quoted, restraining proceedings for foreclosure on the part of individual bondholders until after the requisition made upon the trustee by a certain proportion of the bondholders as therein provided, and a refusal by him to comply therewith, is valid and obligatory upon the individual bondholders as respects the enforcement of the security. * * *. They are to be treated as *stricti juris,* but nevertheless are to be reasonably construed in view of the nature of the mortgage, which is the common security for all the bondholders, and the purposes to be subserved in making them. There is no doubt that the parties could lawfully provide in the same instrument for a reasonable extension of the time for the commencement of foreclosure proceedings, to be determined at the option of a majority of the bondholders. * * * Why may not the mortgage in the common interest stipulate the conditions under which this right may be exercised by the bondholders, and, in order to avoid the risk of rash or arbitrary proceedings which might result in great injury to the security, provide that no such proceedings

should be instituted by an individual bondholder except upon the refusal of the trustee to obey the requisition of a reasonable number of bondholders? It is not the intention or effect of such conditions or stipulations to divest the bondholders of their right to judicial remedies, or to oust the courts of their jurisdiction; it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right. And this distinction is well recognized by the courts. *Gasser v. Sun Fire Office,* 42 Minn. 315, and cases; *Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co.,* 48 Minn. 560. The provisions of this mortgage are not, we think, unreasonable or invalid."

Also, in the case of *Allan v. Moline Plow Co.,* 14 Fed. (2d) 912, the court said: "The limitations in the trust agreement on the right of note holders to sue are not inconsistent with the promise of the Illinois company to pay. They do not prohibit action against the Illinois company for the enforcement of the notes, but they protect against action by less than 25 per cent. of the note holders which the other note holders believe would be disadvantageous to the note holders as a class. These provisions were not written into the trust agreement for the benefit and protection of the Illinois company, but for the benefit and protection of the note holders. They, in effect, provide that, if the Illinois company shall fail to pay the notes, not less than 25 per cent. in amount of the note holders shall determine upon a course of action which will best subserve the interest of the note holders as a class. These provisions, therefore, do not in any wise limit the liability of the Illinois company to pay, but they restrict the method of enforcing payment in the event of default." See, also, *Batchelder v. Council Grove Water Co.,* 131 N. Y. 42.

Under the terms of the sections of the mortgage hereinbefore quoted, the trustee, upon a default in the payment of interest could, if he elected to do so, accelerate the maturity date of this mortgage. But this he has

failed to do. Also, upon the written request of the holders of 25 per cent. of the aggregate amount of the bonds, the trustee must accelerate all of the bonds, and, on refusal to do so, the individual bondholder can take action. The required number of bondholders have not made such a request. Before commencing suit in any event, the bondholder must furnish security for costs and expenses, and this has not been done. Under such circumstances, the bondholder cannot accelerate the maturity date of the bond and his right to sue thereon has not accrued.

Appellees rely upon section 13, art. XI of the mortgage, which provides in part as follows: "Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustees or to the holders of the bonds is intended to be exclusive of any other remedy, but every remedy herein provided shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity, or by statute; and every power and remedy given by this mortgage to the trustees or to holders of the bonds may be exercised from time to time, and as often as may be deemed expedient. No delay or omission by the trustees or by any holder of any bond to exercise any right or power arising from any default, shall impair any such right or power, or shall be construed to be a waiver of any default or an acquiescence therein." It is the contention of appellees that their right to sue at law on their own bonds is an inherent right, which, if it could be taken away at all, could only be taken away by express and unequivocal language either in the bonds or in the mortgage, and that such right to sue at law is preserved in the section of the mortgage just quoted. It will be noted that this section states, "except as herein expressly provided to the contrary," which clearly indicates that some restrictions were contemplated, at least, on the right to sue. Section 14, art. XI of the mortgage, clearly says that "no holder

of any bond shall have the right to institute any suit, action or proceeding at law or in equity" unless conditions precedent are complied with. This section also says: "It being understood and intended that no holder of any bond or interest coupon shall have any right in any manner whatever to affect, disturb or prejudice the lien of this mortgage by his action, or to enforce any right hereunder, except in the manner herein provided." That this is express and unequivocal language restricting the right of a bondholder to bring suit on a single bond cannot be successfully refuted. That suits at law on bonds by individual bondholders, or even by one bondholder, would affect, disturb or prejudice the lien of the mortgage is quite apparent from the nature of the whole transaction. We conclude that section 13, art. XI of the mortgage, can have no application to the cases at bar in view of the valid restrictions against suits of this kind contained in other parts of the mortgage indenture.

In discussing a like proposition, the court in the case of *Home Mortgage Co. v. Ramsey*, 49 Fed. (2d) 738, said: "Moreover, we think that the plaintiff is precluded from maintaining this suit by the terms of her bonds and the indenture securing them which provide in substance that action can be taken for the protection of the interest of the bondholders only where a certain number of the bondholders join. These provisions have already been quoted. The plaintiff argues that these provisions are void because it is an attempt to oust the jurisdiction of the courts. We do not so regard them. Under the terms of the bonds and indenture, the trustee is the representative of the plaintiff, and entitled to bring suit. The provisions are merely reasonable conditions precedent to the right of the plaintiff to bring the suit herself. They are intended for the security of all the bondholders, and no doubt rendered the bonds more salable. They were devised for just such a case as is presented here, where one bondholder, or a small minority, is determined upon action which a large majority believe

hostile to their interests. The limitations imposed by the contract have not been met in this case. The plaintiff has not only not complied with the provision, but has made no demand whatever upon the trustee to take action, nor is there any showing that, if such demand had been made, it would be futile. If it were shown that the trustee had colluded with the majority of the bondholders, or was engaged with the Home Mortgage Company in perpetrating a fraud upon the plaintiff, and that the other bondholders would not join with her in protecting their rights, a different situation would be presented; but there is no such showing. The plaintiff as against the corporation is seeking to enforce rights which the trustee is the proper person to enforce. She has made no demand upon the trustee to safeguard these rights, and has not secured the cooperation of the bondholders required by the provisions of the indenture." The reasoning and logic contained in this quotation are particularly applicable to the cases at bar.

We hold that the maturity date of the bonds in suit could not be accelerated by appellees except upon the happening of the conditions precedent contained in the mortgage, that said conditions had not been complied with by appellees at the time the suits at bar were commenced, that the conditions precedent to a suit at law were reasonable and enforceable, and that the suits were therefore prematurely brought.

For the reasons herein set out, the judgment of the district court in each case is reversed and the actions dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF SUSAN F. KIERSTEAD. METHODIST EPISCOPAL CHURCH OF TILDEN ET AL., APPELLANTS, V. LEO P. PASEWALK, EXECUTOR, ET AL., APPELLEES.

FILED MARCH 29, 1935. No. 29141.

1. **Wills: PROBATE: APPEAL: JURISDICTION.** On an appeal from the county court in a proceeding to determine whether an instrument offered as a will should be admitted to probate, the jurisdiction of the district court is limited ordinarily to such determination.
2. ———: ———: ———. In settlement of will contest appealed from county to district court, interested parties contract for different disposition of estate than provided by will. *Held*, under facts, sole foundation for judgment entered by district court on such settlement is contract of the parties, and in absence of ratification or other approval, the judgment is binding only on those who signed the contract.
3. **Process.** Ordinarily, judgments in actions *in rem* declare status; those *in personam* declare or adjust personal rights. For the court to acquire jurisdiction in the former, constructive service is sufficient; in the latter, personal service or its equivalent, or appearance, is essential.
4. **Wills: PROBATE: ACTION IN REM.** A proceeding to determine whether an offered instrument should be admitted to probate as a will is an action *in rem*. Generally on appeal in such proceeding the rights of the several legatees cannot be determined.
5. ———: **JURISDICTION.** When it appears from the record that the court had no jurisdiction of the question it assumed to decide, want of jurisdiction may be raised by an affected party in a collateral proceeding.
6. **Estoppel.** That contestants promised legatee amount of bequest if the will were denied probate and legatee became witness for contestants, *held* these facts alone insufficient to bar legatee's recovery under will when admitted to probate.
7. ———. Evidence examined, and *held* insufficient to require application of principle of estoppel.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

Deutsch & Young, for appellants.

M. S. McDuffee, Hoagland, Carr & Hoagland, George M. Spurlock and *C. W. De Lamatre, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

A will contest requiring about eight weeks' trial time, in which two juries disagreed, resulted in a compromise between contestants (relatives of deceased) and represented legatees (charitable organizations and old friends of testatrix). Under the terms of the compromise contract, contestants were given about half the estate's value; certain legatees entitled to specific bequests, some large, abated the same or were classed under the residuary clause of the will; all bequests were greatly reduced; and the will was admitted to probate. Five specific legatees, to whom, under the terms of the contract, about 35 per cent. of the bequests to them was paid, were not represented by counsel in the settlement, made no general appearance in the trials, were not signatory parties to the contract, and, it was agreed, were not parties in the contest except as they might be such by the jurisdictional notice to all persons interested in the estate, the "*in rem*" nature of the proceedings.

The objections to the probate of the will were filed in the county court, but the contest was reserved for the district court, to which, after admission of the will in the county court, contestants had appealed. The district court entered a judgment on the compromise by agreement of the contracting parties, ordered payment in district court of amount due contestants, and remanded the cause to the county court for disposition in accordance with such contract. The executor acted on the directions so received, and it was thereafter, August 12, 1930, that the five before mentioned specific legatees were paid their respective reduced amounts. These five thereafter demanded of the executor payment of the remaining total of each of their specific bequests, and being granted an order by the county court to require payment of such by the executor, the latter appealed to the district court

where the order of the county court was set aside, the district court holding the agreed settlement and judgment entered thereon to have been a bar to any further claim. To set aside the judgment of the district court, four of these specific legatees, John R. Saxton, Methodist Episcopal Church of Tilden, Nebraska, Lillie Pryce and Guy E. Kierstead have appealed to this court. Other questions in this estate, but not here involved, have been presented heretofore in this court. See *In re Estate of Kierstead,* 121 Neb. 423, and 122 Neb. 694. The questions, material to a decision, raised by this appeal are hereinafter stated.

First: Are these petitioners bound by the judgment entered on the contract between the litigating parties in the will contest? The defendants contend that the general notice and the *in rem* nature of the proceeding made petitioners parties bound by any judgment the court would enter. However, the cause being an appealed inquiry into the validity of the will, the court's sole function was to determine that inquiry; the district court's jurisdiction in the first instance extended only to such determination. All persons interested were bound only by a judgment entered within such jurisdictional limitations. The reduction by the court of the amounts due petitioners under the will affected, beyond the permitted limited inquiry, their personal rights to the same extent as if a judgment for the abated amounts had been rendered against them. It seems elementary that such personal rights cannot be invaded by a proceeding *in rem.*

The general principle is well settled that "jurisdiction of the property does not draw after it jurisdiction of the person, and although there has been a seizure of the *res* the court does not acquire jurisdiction of the parties *in personam.*" 15 R. C. L. 642, sec. 85.

The principle is illustrated in the case of *Fitch v. Huntington,* 125 Wis. 204, a suit in the nature of an action to quiet title against a mortgage in which the trial court found and adjudged that the mortgage and

note secured thereby had been satisfied, and discharged the mortgage of record. In a subsequent suit on the note defendant contended that the note was discharged and all personal liability terminated in the former case, although there had been constructive service only and no personal service on the defendant in such action. The court, however, held that the trial court in the first case had jurisdiction to discharge the mortgage of record, but that the court had no jurisdiction to adjudicate the defendant's personal rights and that the judgment was not effectual to bar a personal recovery on the note. To the same effect see *Combs v. Combs,* 249 Ky. 155, in which it is said, quoting 2 Black, Judgments, sec. 792, an analysis taken from a Vermont case, *Woodruff v. Taylor,* 20 Vt. 65: "A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state, or condition, of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be."

In the *Combs* case is stated the general rule taken from 1 R. C. L. 328, sec. 13, and 15 R. C. L. 848, sec. 322, that proceedings to enforce personal rights and obligations as between individuals are *in personam;* and personal judgments adjusting the rights and obligations between the affected parties cannot be rendered without personal service on or entry of appearance by defendant.

It is this distinction in actions *in rem* and *in personam* which marks the right to declare a *status* or enforce personal rights, or, as here, the right to determine the amount which a legatee shall receive.

As pointed out by Mr. Justice Holmes in *Becher v. Contoure Laboratories,* 279 U. S. 388: "A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world." Similarly the principle is stated in a Missouri case:

"The statement that judgments *in rem* are binding on the whole world is true only in a restricted sense. The judgment establishing the status of a person or thing or the title to property is conclusive on every one; but not so of the related findings of fact, no matter how necessary to the result. * * * The effect on the *res* cannot be disputed, but to extend the finality of the judgment to its inducing conclusions of fact, when the same facts are later at issue in a collateral action not affecting the *res*, would be to make the judgment *in rem* operate *in personam*." *State v. Fidelity & Deposit Co.*, 317 Mo. 1078.

"That the proceeding was *in rem*, and that all the world were parties thereto, may be conceded. It will also be conceded that, ordinarily, a judgment *in rem*, rendered by a court of competent jurisdiction, is binding on all persons, and is not open to collateral attack. But it does not necessarily follow that the whole world are bound by every matter litigated and judicially determined in the proceeding of which such judgment is the product. The principal relief sought in a proceeding *in rem* is usually an adjudication upon the status of some person or thing, and the judgment, *ipso facto*, renders the status of such person or thing what it declares it to be. *Woodruff v. Taylor*, 20 Vt. 65. From the very nature and purpose of such judgment, it is essential that it be conclusive and binding on all persons. But in addition to the principal relief sought in a proceeding *in rem*, in which, in a general way, all persons may be said to be interested, there is also commonly involved some personal right pertaining to some particular person or class, which may become the subject of litigation and adjudication in such proceedings between the parties claiming such right, and to which all other parties to the proceeding may be wholly indifferent. While it is essential to the repose and tranquillity of society that a judgment *in rem*, so far as it goes to the principal relief sought in the proceeding and concerns the rights which each

person shares in common with every other person, should be binding on all persons, it would be unreasonable and oppressive to hold that all are bound by the litigation and determination of collateral questions, arising between parties litigating their personal rights in the same proceeding. If such were the law, no man could safely stand aloof while such proceedings are in progress, however indifferent as to the ultimate result, because he could never know to what extent his rights, wholly disconnected from the main purpose of such proceedings, might be affected by the issues framed between other parties therein for the determination of questions concerning only themselves. Such a rule would lead to infinite complications." *Sorensen v. Sorensen,* 68 Neb. 483, 494.

Here the *res* is the will. The known, permitted and expected inquiry by the court in such proceeding *in rem* is the status of the will. To that extent "all persons interested" would be bound. How much each legatee should receive was not within the "expected" inquiry the court was permitted to conduct and thus not within the issues upon which one not appearing would be bound. The court might and would look with favor on disposition by the parties of all questions relating to the estate, and a disposition by contract at variance with the will, to which all interested were parties, would not require the aid of the court if the rights of creditors were not involved. The parties could lawfully bind themselves, under the conditions, to any disposition to which they might agree. Ann. 81 A. L. R. 1187; Ann. 6 A. L. R. 555. Thus the validity of the disposition does not depend upon any action of the court. Necessarily it must follow that what the court might do, if acting on the contract, would depend upon the validity of the latter, and if the contract were invalid in that respect the court's judgment must fail. 34 C. J. 130. It is elementary that one is not bound by a contract he does not sign or authorize. Here the petitioners did not sign or authorize the contract of settlement, and cannot be bound by it, and in so far as

the judgment is based upon the contract the petitioners are not bound by the judgment. We are aware of no authority in the county court or in the district court on appeal, and counsel has cited none, to enable either court to compel a legatee to accept less than the will provides. Seeking, then, for lawful authority to determine the binding effect of the judgment on these petitioners, we are compelled to revert to the court's jurisdiction, the limited inquiry which the court could make, and since the reduction of petitioners' bequests did not fall within a determination of the validity of the will, the foundation of all authority to bind these petitioners fails.

That the question is now raised collaterally constitutes a bar, defendants contend, to petitioners' present action. In *Banking House of A. Castetter v. Dukes*, 70 Neb. 648, it is said: "It has often been somewhat loosely stated that, if a court had jurisdiction of the person and of the subject-matter, its judgments were not subject to collateral attack. While in a general sense this is true, there is a qualifiying principle that is often overlooked, which is, that the court must also have jurisdiction of the particular question which it assumes to decide." And further in the syllabus to that case it is stated that, if it appears from the face of the record "that the court acted without jurisdiction, then the judgment is a mere nullity and may be attacked collaterally." In *Dryden v. Parrotte*, 61 Neb. 339, it is said: "A judicial order or judgment cannot be attacked in a collateral proceeding unless affected by some jurisdictional infirmity." Here the action being one *in rem*, the jurisdiction of the court, as we have shown, extended merely to an inquiry as to the status of the will. The court had no jurisdiction of the particular question which it assumed to decide; and the reduction of petitioners' bequests being in the nature of a personal judgment, the act was beyond the court's power in that character of proceeding. The "jurisdictional infirmity" being apparent, the question is properly raised collaterally. As said in the syllabus to *Gar-*

rett v. State, 118 Neb. 373: "A decree of court which is void for want of jurisdiction may be attacked in any proceeding in which any person seeks to assert a right under it. It may be attacked whenever it is sought to be enforced or in any suit in which its validity is drawn in question."

Defendants rely upon the presumption of jurisdiction through the recitals in the court's judgment, and assert that sufficient of the files upon which the district court acted are not in the record; that therefore this court is unable to say fully upon what the district court based its judgment, and thus that the presumption of regularity must apply. However, the recitals show who was present and these petitioners were not listed. A stipulation made by the parties furnishes all missing facts. Furthermore, petitioners offered to produce facts from court records, but defendants objected to the offers on the ground that the facts were all sufficiently admitted by the stipulation, and the trial court sustained the objection on that ground. The defendants cannot now be heard to say that such facts are not sufficiently shown.

Admission of the will to probate by consent of the interested parties, except these petitioners, was solely conditional, the condition being the agreed and different distribution of the estate. The court's judgment is founded on the agreement. Thus arise the interesting questions: Is one, not a party, bound by the condition? or to such is the will freed from conditions and wholly admitted to probate? If the former, must these petitioners pursue the contest for the general admission of the will in order to establish the whole amount of the bequests to them? The questions are now, however, purely academic. All the contestants were parties to the agreement; no one remains to offer resistance to the will's general admission. So the practical effect is a general admission of the will to probate and a substituted division of the property by the agreeing parties.

We have searched eagerly, but in vain, for evidence to

warrant the application of the principle of equitable estoppel. The latter is based fundamentally upon a canon of accurate reasoning that inconsistent facts cannot exist at the same time. Because the ordinary human consciously or unconsciously relies upon this truth and acts upon it, a rule has arisen that one who by speech or action or failure to speak or act, when reasonably he should do so, has led another to his detriment reasonably to believe that a fact is true, the former is not ordinarily thereafter permitted to assert the contrary then to have been true.

(A) After the will contest was settled, inheritance tax was assessed against the various legatees. The ruling of the county court that the assessment of tax should be made on a basis of the bequests in the will was appealed to the district court. The latter reversed the county court, thus requiring assessment on a basis of the amounts named in the settlement contract, and this latter ruling was later sustained in the supreme court. *In re Estate of Kierstead,* 122 Neb. 694. Defendants seek to draw the inference of petitioners' accord with and approval of the settlement contract by this incidental litigation, a ratification of the contract, and such activity now a bar to a different claim. However, the record does not show any appeal or participation by these petitioners in such suit, although made parties in such appeal. The record affirmatively shows the appeal to have been taken by some of these defendants. Furthermore, evidence is lacking of any reliance by defendants on such claimed fact or change of position by them.

(B) Neither do we find evidence to supply an estoppel in the delay by petitioners in asking for payment of the deferred amounts. The record shows that the partial payments were made to petitioners August 12, 1930, and that application for payment of the remainder of the bequests was made to the court about six months after the executor would normally be required to pay, or about eighteen months after his appointment, but no evidence is offered to show that defendants were detrimentally affected by such delay.

(C) Acceptance by petitioners of the decreased amounts is not shown to have been done with knowledge by petitioners of the facts upon which such payments rested; nor does the evidence show such payments to have been tendered as in full settlement.

In no one of the foregoing instances does the record show that defendants or any of them, relying upon any such, acted or failed to act, or were in any way affected. Though the settlement of the contests was wise and fair, and petitioners ought morally to be bound, yet we cannot supply evidence on which the record is silent in order to hold petitioners legally.

Defendants use a subtle and appealing form of persuasion to convince us that through the following facts all the petitioners are barred from recovery, particularly petitioner Saxton. Petitioner Saxton arranged with contestants that, in the event the will were denied probate, all the petitioners should receive the same amount as the will gave them; and then three of them became witnesses on behalf of contestants, petitioner Saxton being designated as the "star" witness. It would seem that such contriving for advantage should be rewarded by no security greater than a wager, but a logical analysis of the facts compels us to reach a different conclusion. Here justice is interested only in truth; and if the ultimate effect of an arrangement of that character is merely to relieve the natural mental reserve and permit the witness freely to tell what he knows about the facts, we find no moral hazard in the arrangement. Furthermore, it has heretofore been held that a contestant is not barred from recovery under the will by his act of contesting. *State v. Adams*, 71 Mo. 620. A different situation might arise, and incidentally a different conclusion might be reached, if proof showed that the consideration for the promise were testimony favorable only to contestants.

Ordinarily interest is to be allowed on a specific legacy after one year from the appointment of the executor. *Smullin v. Wharton*, 83 Neb. 328; *In re Estate of Bullion*, 87 Neb. 700; *Lewis v. Barkley*, 91 Neb. 127.

When, however, to charge the executor with interest would be inequitable, as when delay in payment has been caused by a will contest or through litigation which prevented speedy administration of the estate, the executor is not ordinarily chargeable with interest, at least until a reasonable time has elapsed after his difficulty has ceased. *Goodman v. Palmer*, 137 Tenn. 556; *In re Doty's Estate*, 231 Mich. 115; *Phelps v. Fitch*, 178 Mass. 442.

Allowance of interest which has been applied to estates is controlled by sections 45-101 to 45-104, Comp. St. 1929, and those portions of the statutes controlling the payment of claims in decedents' estates, sections 30-610 *et seq.*, Comp. St. 1929, as amended. See *Bell v. Arndt*, 24 Neb. 261; *Smullin v. Wharton*, 83 Neb. 328, 346. Section 45-104, Comp. St. Supp. 1933, as here applicable, provides for statutory interest "on money * * * due, and withheld by unreasonable delay of payment." What constitutes unreasonable delay is a question of fact. In this case the executor was unable to proceed with the administration of the estate pending litigation. Subsequently funds were impounded through insolvency proceedings of a Norfolk bank. Under these and all the conditions, we think it fair that the executor be charged with interest on the specific legacies allowed in this opinion only from the 14th day of December, 1931, at 7 per cent.

We believe we have covered all propositions raised by petitioners, and in view of the foregoing conclusions, the judgment of the district court is reversed and the cause is remanded, with directions to enter judgment in favor of petitioners, Methodist Episcopal Church of Tilden, Nebraska, for $650, John R. Saxton, $325, Lillie Pryce, $975, and Guy E. Kierstead, $650, with interest on each amount from December 14, 1931, at 7 per cent.

REVERSED.

HOWARD STOVE & FURNACE COMPANY, APPELLANT, V. JOSEPH H. RUDOLF ET AL., APPELLEES.

FILED APRIL 5, 1935. No. 29234.

1. **Judgment**: VACATION. The provisions of section 20-2001, Comp. St. 1929, enumerating grounds under which judgments may be set aside after the expiration of the term at which they were rendered, are concurrent with independent equity jurisdiction. *Abbott v. Johnston*, 93 Neb. 726.
2. ———: ———. Where the circumstances call for equitable relief, a decree may, upon petition in equity, be set aside by a court of equity having jurisdiction of the parties and of the subject-matter of the suit, after expiration of the term at which it was rendered.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

W. A. Ehlers, for appellant.

Anson H. Bigelow, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

GOSS, C. J.

Plaintiff appeals from an order made February 7, 1934, vacating a decree (which allowed plaintiff $141.95 and costs on foreclosure of a mechanic's lien) duly entered by default on March 3, 1931.

Defendants' motion to vacate the decree was filed May 9, 1931. The February term, at which the decree was entered, adjourned *sine die* on May 2, 1931. This motion was overruled on May 22, 1931, because it was not filed within the term at which the decree was rendered. In the same order the court further sustained "the motion of defendants to deny" confirmation of a sale of the property made by the sheriff on May 5, 1931, and set the sale aside.

June 4, 1931, defendants filed what is entitled a "petition to open decree in order to defend." It was in substance and effect a petition in equity to vacate the decree, for a chance to defend and for a trial of the cause. Plaintiff

demurred to this petition on the grounds that (1) it failed to state sufficient facts, (2) the court was without jurisdiction, (3) the matters contained in the petition were adjudicated March 3, 1931, no appeal had been taken and the decree had become final. The demurrer was overruled and plaintiff answered, traversing the allegations of the petition.

Defendants say in their brief that the statutory grounds for vacating a judgment at a subsequent term, as found in chapter 20, art. 20, Comp. St. 1929, do not "strictly" apply. See particularly the grounds set forth in section 20-2001, Comp. St. 1929. But defendants argue that, because it was a decree entered upon default, equity arising out of the circumstances allows them to reopen the decree for trial on the merits quite independent of the statutory grounds.

In *Abbott v. Johnston,* 93 Neb. 726, it was held, in an opinion by Judge Rose, that section 602 of the Code (now section 20-2001, Comp. St. 1929) enumerating grounds under which judgments may be set aside after the expiration of the term at which they were rendered, "does not provide the exclusive remedy. Its provisions are concurrent with independent equity jurisdiction"—citing eleven Nebraska cases. It was accordingly there held: "The dismissal of an action for want of prosecution, on motion of defendant without notice to plaintiff, may, after expiration of the term at which the order was rendered, be set aside by a court of equity having jurisdiction of the parties and the subject-matter of the suit, where the circumstances call for equitable relief." This case has been cited in a number of later cases unnecessary to cite or quote here. The principles announced are firmly established.

The salient facts in the instant case, stated briefly as may be are as follows: August 8, 1923, Howard Stove & Furnace Company entered into a written contract with Joseph H. Rudolf to install a furnace in the home occupied by Rudolf and wife for $242, to be paid for as follows: "$25 when furnace installed, balance $15 per month, 8

per cent. interest." The furnace was installed (though defendants claim imperfectly) in the fall of 1923. July 30, 1924, the furnace company filed a mechanic's lien for the $242, with interest at 8 per cent. from November 29, 1923. The lien made claim that the first item was furnished October 6, 1923, and the last item on April 11, 1924. The petition for foreclosure, filed July 2, 1926, admits payment of $72 on the contract, charges $1.25 on account of the filing of the lien, and prays foreclosure for the resulting balance of $171.25 with interest. No action was taken in the case for several years and in the fall of 1930 it was put on the dismissal docket. Pursuant to court rules, it was dismissed December 6, 1930. G. R. Danielson having received from the furnace company on October 2, 1930, an assignment of the claim, filed a motion on January 29, 1931, to vacate the order of dismissal and to reinstate the cause, substituting him as plaintiff, which was done.

Defendants' petition alleged in substance that before answer day they had an oral agreement with the then plaintiff to pay the balance as regularly as their employment would permit and in consideration thereof the then plaintiff agreed not to press the suit to judgment; that subsequently at various times these defendants paid upon the indebtedness $131.70 (in addition to the $72 paid before the suit was begun) making a total of $203.70 paid by defendants and received by plaintiff on account; that plaintiff had given a written guaranty to replace castings showing defects of manufacture within five years, but had failed and refused to perform under the written guaranty to defendants' damage in more than the balance due; that the mechanic's lien, if available to plaintiff at all, was not filed within time after the last work was done; that the contract between the parties, attached to the mechanic's lien, provided that, until the furnace was paid for, it should remain the personal property of plaintiff with authority to enter upon said premises and remove the furnace and appurtenances; that by reason of the premises

the lien was void and the indebtedness paid. Issues were joined by answer and the matter was tried to the court upon evidence that is found in a bill of exceptions. At the end of the trial it was found by the court sufficient to warrant the setting aside of the decree and defendants were allowed 10 days to answer the petition for foreclosure of the lien.

There was sufficient evidence on behalf of defendants, if believed, to justify the opening up of the decree by the trial court. It would serve no good purpose to detail it. It supported the allegations of the petition. The trial court heard the witnesses and observed their demeanor. While we try the case *de novo,* we are not, under the rule, required to reverse a decision of the district court in the circumstances unless it is clear that it erred in appraising the evidence. The evidence was sufficient to indicate that defendants had grounds for the defense they tendered, and that it had not been made before the decree was entered may have been the fault of plaintiff. Equity requires that defendants be given their day in court. Justice will ultimately prevail thereby when otherwise we could not be at all certain.

The judgment of the district court on the particular order appealed from is

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLEE, V. JOHN BROWN ET AL., APPELLEES: DAN DAILEY, TRUSTEE, APPELLANT.

FILED APRIL 5, 1935. No. 29249.

Record examined and refusal of district court to set judicial foreclosure sale aside affirmed.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

J. H. Barry and *Pallat & Dolezal,* for appellant.

Hendricks & Kokjer, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

GOSS, C. J.

The district court overruled a motion to set aside a sale made under a decree of foreclosure, and Dan Dailey, trustee of the depositors' committee of Colon State Bank, who was a cross-petitioner, appealed.

The decree was entered December 24, 1932, giving plaintiff a first lien on a quarter-section of land for $13,297.02, with interest at 10 per cent. from November 30, 1932, giving Dailey as trustee a second lien for $8,309.46, with legal interest, and granting the owner a stay of eleven months. An order of sale was issued November 29, 1933. The sheriff duly sold the land to plaintiff for $14,820 and the sale was confirmed January 9, 1934. On January 20, 1934, Dailey filed his motion to set aside the confirmation because (1) of inadequacy of the consideration for which the property sold, (2) of misrepresentations made prior to the sale, deterring prospective purchasers, (3) if the premises are resold they would bring a greater price, and (4) the cross-petitioner had no opportunity to file objections to the confirmation. The matter was duly heard on the record, on affidavits, and on the testimony of six witnesses. The court entered a decree on the motion finding that the objector was present at the sale, knew the amount bid, and that the real estate was sold to plaintiff; that neither the objector nor any member of the depositors' committee made any effort to obtain a bidder at the sale, nor made any objection to the confirmation thereof until more than ten days after said sale had been confirmed, and not until the real estate had been sold to an innocent third party; and that there were no misrepresentations or misconduct connected with the sale. The errors assigned are that the judgment is contrary to the law and not sustained by the evidence.

The evidence shows that Paul C. Burmeister had pur-

chased the decree of foreclosure from plaintiff in November, 1933, and that, after the sale was confirmed, he purchased for a consideration of $550, from John Brown, the owner of the fee, his waiver of a moratorium and equity of redemption. There was another consideration in the deal. That was the leasing of the land for three years to Lloyd Brown, son of defendants Brown. Before the motion by Dailey was filed, Burmeister had sold the land to William Pickett, who is the party mentioned in the decree as the innocent purchaser. Burmeister had sold the land for $16,250, had received $2,000 down and agreed to give a warranty deed on March 1, 1934. When the land was sold at the judicial sale the 1932 taxes, amounting to $293 and interest, were delinquent.

An affidavit of Arthur Rasmussen, dated January 29, 1934, shows that he would, if the land was offered again at judicial sale, bid $16,500.

Without detailing the evidence, it shows there were no misrepresentations deterring bidders, that the appellant waited eleven days after the confirmation of sale before moving to set it aside, and that, in the meantime, the land had been sold to an innocent purchaser and had been leased for three years to a tenant by an arrangement, a part of the consideration of which was the waiving of legal rights by the mortgagor defendant. In view of these facts and of the accumulating interest and taxes, we think the increase of the offered bid was not a good reason for the district court to set the sale aside. While the order to show cause against confirmation gave short notice, we presume, in the absence of evidence to the contrary, that it complied with the rules of the court. None of the grounds assigned warrants a reversal. The judgment of the district court is

AFFIRMED.

MARY CHARLES MCCARTNEY, APPELLANT, V. HAROLD G. MCCARTNEY, APPELLEE.

FILED APRIL 5, 1935. No. 29180.

1. **Appearance.** A nonresident whose property has been seized under a writ of attachment may, without making a general appearance, demand the relief to which want of jurisdiction entitles him.
2. ———. A motion by a nonresident whose real estate has been attached for obligations not yet due, if limited to the quashing of the writ and the levy thereof for want of jurisdiction over his person, is not a general appearance.
3. **Attachment.** In an action on a claim before it is due, an attachment is allowable only on the grounds and conditions prescribed by statute. Comp. St. 1929, sec. 20-1049.
4. ———. The statute authorizes an attachment in an action on a claim not due, where the debtor disposed of property or is about to dispose of it or is about to remove it, with a fraudulent intent to cheat his creditors or to hinder or delay them in the collection of their claims; but, in absence of all such grounds, his property is not attachable for contractual obligations not yet due.
5. ———: DISSOLUTION. The proper dissolution of an attachment issued on a contractual obligation not yet due terminates the action.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Robert G. Simmons, for appellant.

Bruckman & Dunmire, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

ROSE, J.

This is an action to recover judgment for monthly instalments of $60 each, which Harold G. McCartney, defendant, obligated himself by written contract to pay to Mary Charles McCartney, plaintiff, for the support of their daughter during the latter's minority. The contract was executed when the parties to it were husband and wife, but living apart from each other. The husband deserted

his wife and she procured a divorce from him without an allowance for alimony or a judicial order committing to her the custody of the child who lives with her mother by agreement of the parents. Plaintiff and defendant are nonresidents of Nebraska. They reside in the District of Columbia.

The petition is drawn in a form purporting to state three causes of action, one for each of the following items: First, judgment recovered in the District of Columbia for unpaid instalments, $320; second, other delinquent instalments, $340; third, amount still to accrue under the contract during the child's minority, $6,840.

The action was prosecuted in the district court for Adams county without personal service therein on defendant. The district court had such jurisdiction as was properly acquired by the attachment of defendant's interest in Nebraska real estate on which the sheriff levied under the writ. In this situation defendant proceeded as follows:

"The defendant appearing specially and for the purpose of this motion only and for no other purpose, moves the court to quash and set aside and discharge the attachment and the levy thereof, for the reason that said attachment was not ordered by the court or any judge thereof and that the affidavit upon which it is based is insufficient and does not meet the requirements of the statutes of Nebraska in such case made and provided and all of which appears from the records and files in the case."

In this challenge to jurisdiction defendant directed his motion jointly to the attachment issued on the claims described in the three alleged causes of action, the first and second being based on matured but unpaid 60-dollar instalments and the third on instalments not yet due. The district court specifically found that the appearance was special, was so intended, and was not general, but did not dissolve the attachment. The failure to quash as to all three claims was free from error, because the district court had jurisdiction to issue attachments on the past-due

claims described in the first and second causes of action. Later, defendant made an appearance in this form:

"The defendant, appearing specially and for the purpose of this motion only and for no other purpose, moves the court to quash and set aside and discharge the attachment and the levy thereon in so far as the same has reference to and is based upon the third cause of action set forth in plaintiff's petition, for the reason that the claim or debt set forth in said cause of action is not yet due and that said attachment was not ordered by the court or any judge thereof and that the affidavit upon which it is based is insufficient and does not meet the requirements of the statutes of Nebraska, in such case made and provided, and all of which appears from the records and files in the case."

Upon a hearing on the second motion to quash, the district court found that this was a special appearance; that defendant did not appear generally; that there was no personal service on him in Adams county; that consequently the attachment as to the third cause of action on obligations not yet due was void for want of jurisdiction. From a judgment in favor of defendant on these findings and dismissing the petition as to the third cause of action, plaintiff appealed.

Plaintiff argues as a ground for reversal that an appearance which does not question the jurisdiction of the court over the person of defendant, but calls upon the court to rule on the merits of a cause of action pleaded in the petition, constitutes a general appearance, citing many cases. The doctrine thus invoked, though ably presented, does not seem to control the present controversy. The district court sustained the attachment to enforce payment of the past-due instalments pleaded in the first and second causes of action and entered judgment therefor by default under the jurisdiction acquired by the sheriff's levy under the writ.

Did defendant enter a general appearance in the third cause of action for the recovery of a judgment for obli-

gations not yet due with consequent liability for failure to answer to the merits of that part of the petition? It is obvious on the face of the appearance itself that defendant did not intend to appear generally. He did not say he so appeared. On the contrary, he made it clear that he appeared specially for the sole purpose of moving to quash the attachment and the levy thereof as to the third cause of action on the ground that the writ was based on obligations not yet due, as shown by the record which plaintiff herself had made. No other relief was demanded. The appearance went no further than to seek the relief demandable in absence of jurisdiction. A nonresident whose property has been seized under a writ of attachment would be in a precarious situation, if he could not demand the relief to which want of jurisdiction entitles him, without making a general appearance. What was meant to be challenged was jurisdiction to attach the realty of defendant, a nonresident, for contractual obligations not yet due. Reference to the petition and to the affidavit for attachment was made in the appearance for the purpose of showing want of jurisdiction. In an early case it was said:

"It would be unreasonable to oblige any man living in one state, and having effects in another state, to make himself amenable to the courts of the last state, that he might defend his property there attached." *Bissell v. Briggs*, 9 Mass. *462.

A motion by a nonresident whose real estate has been attached for obligations not yet due, if limited to the quashing of the writ and the levy thereof for want of jurisdiction over his person, is not a general appearance. *Coffman v. Brandhoeffer*, 33 Neb. 279; *Tanner v. DeVinney*, 101 Neb. 46. An annotator has collected a list of cases of like import in 55 A. L. R. 1121.

The law is: "An attachment will be allowed in an action for a claim before it is due only upon the grounds and the conditions prescribed by statute." *Merchants Nat. Bank of Omaha v. Jaffray*, 36 Neb. 218. See *Caulfield v. Bittenger*, 37 Neb. 542; *Cox & Cornell v. Peoria Mfg. Co.*, 42

Neb. 660. The statutory grounds for an attachment in an action on a claim before it is due are enumerated as follows:

"First. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; Second. Where he is about to make such sale, conveyance, or disposition of his property with such fraudulent intent; Third. Where he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts." Comp. St. 1929, sec. 20-1049.

The attachment issued on the claim described in the third cause of action was not authorized on any ground enumerated in the statute. The proper dissolution of the attachment issued on the claim not due terminated the third cause of action. *Dayton Spice-Mills Co. v. Sloan,* 49 Neb. 622.

In view of the conclusions herein reached on the law and the facts, the district court did not err in holding that defendant's appearance was special, in dissolving the attachment issued on the claim not due, and in dismissing the petition as to the third cause of action.

AFFIRMED.

STATE, EX REL. CHESTER RISHLING, APPELLANT, V. GEORGE W. ALLEN ET AL., APPELLEES.

FILED APRIL 5, 1935. NO. 29229.

1. Municipal Corporations: CHARTER: AMENDMENT. The board of directors of the police relief and pension fund of the city of Omaha is without power to amend or alter any of the provisions of the Omaha home rule charter; nor can such board adopt a valid by-law or rule that is in direct conflict with a provision of such charter.
2. ———: POLICE OFFICERS: SALARIES. "The city council (of the city of Omaha) may, by ordinance, at any time, change,

fix or revise the salaries or compensation of the officers or men of the police department." Home Rule Charter, art. V, sec. 8.

3. ———: ORDINANCES. The court will not inquire into the motives actuating the city council in enacting an ordinance. It will inquire only as to whether they have acted within the powers legally granted.

4. ———: POLICE OFFICERS: PENSIONS. Officers and members of the police department of the city of Omaha have the absolute right to retire from active service at any time after they have attained the age of 50 years and have served in the department for 20 years or more, and receive a pension of half their salary at the time of such retirement.

5. **Mandamus**: PENSIONS. Mandamus is proper remedy to compel board of directors of police relief and pension fund of the city of Omaha to issue order or warrant to a member of police force of such city who has been legally retired from active service on a monthly pension of one-half of his monthly salary at the time of retirement.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed, with directions.*

Frost, Hammes & Nimtz, Lower & Sheehan and *Bernard Stone,* for appellant.

Benjamin S. Baker, Edward Shafton, Seymour L. Smith, Harold Linahan, A. C. R. Swenson and *Philip Klutznick, contra.*

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

GOOD, J.

From a denial of the writ in a mandamus proceeding, relator has appealed.

The facts are not in dispute. Relator has served as a patrolman on the police force of the city of Omaha for upwards of 25 years and attained the age of 63 years. He made application to the city council of Omaha for retirement from the police force on a pension of $90 a month, one-half of the salary he was then receiving. A resolution

of the city council approved his retirement on a pension of $90 a month.

Pursuant to a statute, which is a part of the home rule charter of the city of Omaha, there exists what is termed a police relief and pension fund, which, for convenience, will be hereinafter referred to as the pension fund. The statute provides several sources of revenue for the pension fund, and further provides that the city council shall constitute a board of trustees for the pension fund; that the city treasurer shall be *ex officio* treasurer and custodian of the pension fund. The members of the police force are authorized by statute to make such rules and regulations as to disbursement of the pension fund as they may deem proper; such rules and regulations to be approved by the city council. The members of the police force are required to elect annually a board of directors of the pension fund to whom is intrusted the management of the fund and its disbursements, subject to the approval of the city council. The statute provides that the directors shall invest the fund from time to time, subject to the approval of the city council.

Section 14-613, Comp. St. 1929, in part, reads: "Whenever any person heretofore or after the taking effect of this Act shall have been duly appointed or selected and sworn and has served for twenty years, or more, in the aggregate, as a member, in any capacity or any rank whatever, of the regularly constituted police department of any such city, being of the age of fifty years, or over, such person shall have the absolute right and be entitled, on his application made in writing to the city council to retire from active service on such police force, and shall be allowed a pension equal to half his salary at the time of retirement."

This proceeding is against the city council and the board of directors, to compel the issuance and delivery to relator of an order or warrant for $90 as pension for the month of October, 1933, said amount being one-half of the salary he was receiving at the time he was retired from the po-

lice force. The city council, by answer in the nature of a return to the alternative writ, stated that they were ready and willing to approve the warrant or order if and when such order was directed by the directors of the pension fund. Another charter provision is that the board of directors of the pension fund shall organize and elect a president, vice-president and secretary, and that no payment of any money shall be made from said pension fund except on order of the directors, signed by the president and countersigned by the secretary, and approved by the city council.

The board of directors in their answer, in the nature of a return to the alternative writ, alleged that in July, 1933, relator made application for retirement and was retired, and that his then salary was $150 a month; that he was entitled only to a pension of $75 a month, which had been paid to him; that thereafter he was reinstated to his former position on the police force for a short time, and that the city council in the meantime had, by ordinance, increased his salary to $180 a month; that after serving 13 days relator had again made application for retirement at the increased pension of $90 a month. The directors contend, first, that, under a by-law adopted by the directors, when relator had once retired and received a pension, was later reinstated and again retired, he was entitled to receive a pension no greater than the amount allowed when he first retired on a pension. There was a proviso in this by-law to the effect that it would not apply to persons retiring on account of disability, or who might, through no fault of their own, be compelled to retire. From the record it appears, first, that the members of the police department never adopted this by-law and that it was adopted only by the board of directors; second, the evidence indicates that it never was approved by the city council, and lastly, the by-law is in direct conflict with the statutory and charter provision which gives to a member of the police force, who has served the requisite time and attained the requisite age, the absolute right to retire on a

pension of one-half the salary he is receiving at the time his application to retire is made.

The board of directors is not vested with the power to alter or amend the Omaha charter, and can only make such rules and regulations as are consistent with the Omaha charter. 14 C. J. 362; *Briggs v. Royal Highlanders*, 84 Neb. 834. We therefore conclude that this by-law is invalid and is no bar to the right of relator to receive the pension granted by the city council.

The record shows that the city council, by ordinance, changed the salaries of officers and patrolmen of the police department several times in 1933. For a number of years prior to July, 1933, relator had been receiving a salary of $180 a month. By ordinance, the salary was reduced to $150 a month, and he was put in a position of either retiring on a pension of one-half of that salary, or being laid off from the police force. The reason for this action of the city council is not clear, but probably is imputable to the fact that the revenues and funds of the police department were running low, and it was found necessary to either retire a part of the police force on a pension or lay part off entirely. Rather than be laid off, relator elected to retire on pension of one-half of his then salary of $150 a month. Shortly thereafter another ordinance was passed by the city council further reducing the salaries of officers and patrolmen of the police department, and, still later in the year, 1933, another ordinance was passed, increasing the salaries of officers and patrolmen of the police department, so that relator's salary and the salaries of those in his class would be raised to $180 a month. Relator then applied for reinstatement and was reinstated, and 13 days later filed his application and elected to retire on a pension of one-half that salary, which was granted by the city council. The board of directors, relying upon their by-law above mentioned, and, incidentally, on the proposition that relator's reinstatement at the higher salary, after having once retired, was not in good faith but was done solely for the purpose of permitting him to receive a larger

pension, refused to draw an order or warrant for his pension for a sum in excess of $75. The board concedes that relator is entitled to a pension of that amount.

As we have heretofore stated, the by-law on which the board relies is of no force and effect. Adoption of the ordinance increasing the salary and the reinstatement of relator to his former position on the police force are conceded, but respondents argue that it was a mere subterfuge and that the council did not act in good faith in passing the ordinance raising the salaries, and after the retirement of relator and others in his class, then passing another ordinance reducing the salaries of patrolmen to $120 a month. The action of the city council in passing the several ordinances may or may not be subject to criticism. What motives they entertained is no concern of the court. The court is not the keeper of the council's conscience. We can only inquire whether the council acted within the scope of the authority given them by the charter.

By an amendment to the Omaha charter, duly adopted in November, 1926 (art. V, sec. 8), the salaries of officers and men of the police department of the city of Omaha were fixed, and the salaries of patrolmen who had served for more than four years were fixed at $180 a month, and it was further provided: "The city council may, by ordinance, at any time, change, fix or revise the salaries or compensation of the officers or men of the police department." Thus, the city council were vested with full authority to adopt an ordinance changing the salaries of the members of the police department at any time. The council acted within the power granted.

It may be that the city council were actuated by high motives. The salaries of patrolmen for many years have been $180 a month. Because of decreased revenues, it was necessary to reduce salaries. Relator had served for 25 years. During several years he was entitled to and could have retired on a pension of $90 a month. The council may have been of the opinion that cutting of

salaries was an emergency measure that would last for only a short time, and that relator should receive the same pension as others who had retired previously to passage of the ordinance cutting the salaries. But whether the city council acted with good motives, or otherwise, is not a matter into which the court may inquire. The limit of our inquiry is: Did they act within the powers granted? We have found that they did so act. We think relator was entitled to retire on a pension of $90 a month, and that it is the duty of the board of directors to allow, and have its president and secretary sign and countersign, respectively, an order for his pension at the rate of $90 a month.

Apparently, the trial court refused to grant the writ on the sole ground that there was a plain and adequate remedy at law open to relator. With this view we are unable to agree. By law, the city treasurer is made custodian of the fund. He cannot pay out the fund except upon order or warrant, duly drawn in the manner provided by law. Certainly, no suit could be maintained against the city treasurer; nor could a judgment be entered against the board of directors, and, by law, the pension fund is not subject to garnishment or execution. In any event, if a judgment could be obtained against any one, it could be satisfied only by requiring the board of directors to allow, and its president and secretary to sign and countersign, an order, to have the approval of the city council of such action, before the payment could be made.

We are of the opinion that an adequate remedy at law was not afforded relator. It follows that the writ should have been allowed. The judgment is reversed, with directions to allow the writ.

REVERSED.

W. G. C. BAIN, APPELLEE, V. G. R. KING: G. W. SHAFER ET AL., APPELLANTS.

FILED APRIL 5, 1935. No. 29147.

1. **Guaranty.** The terms of the guaranty herein set forth constitute an absolute contract upon a lawful consideration that the money expressed in the note should be paid at the maturity thereof, at all events.
2. **Evidence** examined, and *held* to sustain the judgment of the trial court.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Stevens & Stevens and *F. A. Anderson,* for appellants.

J. F. Fults, J. P. O'Gara and *Perry, Van Pelt & Marti, contra.*

Heard before ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

EBERLY, J.

This was an action at law upon a promissory note. At the close of all the evidence the district court, on motion, directed a verdict for plaintiff against the defendants G. W. Shafer, E. H. Stoll, H. F. Stoll, Jos. Einstein, and C. M. Evans. No service of process was made on defendant G. R. King, and neither did he enter an appearance in the cause. From the judgment of the court overruling their motions for new trial, the defendants appeal.

The following is a copy of the instrument in suit: "Arapahoe, Nebr. April 20th, 1931. $5,000. Two years after date, I, we, or either of us, promise to pay to the order of W. G. C. Bain, Five Thousand and no/100 Dollars. Value received, with 7 per cent. interest per semiannum from date until paid. Payable at First State Bank, Beaver City, Nebraska. Interest payable annually and defaulting interest to draw interest at ten per cent. per annum. The makers, sureties, indorsers

and guarantors of this note severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in bringing suit against any party thereto, and consent that the time of payment may be extended without notice thereof. We and each of us personally, hereby charge our separate estate with the payment of this note. P. O. Stamford, Nebr. (Corporate seal) Due Apr. 20, 1933. The Arapahoe Flour Mills, Clyde S. Paine, Secy & Treas. Per G. W. Shafer, Prest."

On the back of such instrument appears the following indorsement: "Indorsed and guaranteed payment by G. R. King, G. W. Shafer, E. H. Stoll, H. F. Stoll, Jos. Einstein, C. M. Evans."

The evidence is undisputed that the indorsers and guarantors, whose names appear in the original instrument, are stockholders of the maker and indorsed the same prior to its acceptance by the payee, and that the consideration named was parted with by the payee on the faith and credit of the obligation expressed in the indorsement.

While the answers contain general denials, the execution of the note and of the indorsement and guaranty were fairly admitted by the terms of the defendants' pleading.

Certain other alleged defenses were set forth in the answers which were traversed by the reply of plaintiff. The evidence in the record, however, fails to establish any of these defenses, and it will serve no good purpose to further discuss this feature of the record.

This action was commenced April 29, 1933. The note was, by its terms, then due, and it is conceded that no part thereof had been paid except the interest thereon to October 20, 1932. By the terms of the note the indorsers and guarantors expressly waived "presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in bringing suit against any party thereto."

In view of these circumstances, the controlling principle in the instant case is that the guaranty hereinbefore

set out is "an absolute contract upon a lawful consideration that the money expressed in the note should be paid at the maturity thereof, at all events." *Bloom v. Warder,* 13 Neb. 476. See, also, *Huff v. Slife,* 25 Neb. 448; *International Harvester Co. v. Schultz,* 102 Neb. 753; *Home Savings Bank v. Shallenberger,* 95 Neb. 593.

It appearing from the terms of their contract that the defendant indorsers were in default on the date of the institution of this action, and no part of the note had been paid except as set forth in the petition, the judgment of the district court is right, and it is

AFFIRMED.

LAWRENCE B. GOLDMAN V. STATE OF NEBRASKA.

FILED APRIL 5, 1935. No. 29133.

1. **Witnesses:** CROSS-EXAMINATION. A witness may always be subjected to a strict cross-examination as a test of his accuracy, his understanding, his integrity, his biases, and his means of judging.
2. ———: IMPEACHMENT. A party has a right to lay a foundation for impeachment upon cross-examination, and to subsequently call such named persons to the witness-stand to sustain such impeaching questions.
3. **False Pretenses:** PROOF. To support a conviction for obtaining money on false pretenses (Comp. St. 1929, sec. 28-1207), it must be proved that the owner relied upon such representations. If the owner investigates the representation, and parts with his property relying entirely on the result of his own investigation, the offense has not been committed. On the other hand, if the owner did make some investigation, but would not have parted with his property except for the false representations, then an offense may have been committed.
4. **Criminal Law:** TRIAL: INSTRUCTIONS. It is error to refuse an offered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles of law involved are covered by other instructions given.
5. ———: ———. During the course of a jury trial, it is considered improper for a trial judge to support his rulings by making significant remarks in reference to the evidence to the jury.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

Harold A. Prince, Lawrence B. Goldman and *Herman Corenman,* for plaintiff in error.

William H. Wright, Attorney General, and *William C. Ramsey, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and THOMSEN, District Judge.

PAINE, J.

Lawrence B. Goldman, defendant, was prosecuted in the district court for Douglas county on a charge of obtaining $700 from Lilly Green by false pretenses, in violation of section 28-1207, Comp. St. 1929. The jury returned a verdict of guilty, and he was sentenced to a term of four years in the penitentiary.

The information is not attacked, and the principal errors relied upon for reversal are the refusals to give certain instructions offered by the defendant; and, further, it is insisted that the court erred in sustaining objections to many questions asked by the defendant's counsel, and in admitting answers over the objections of defendant's counsel to a number of questions. The defendant also objects to some 12 remarks made by the court in the presence of the jury during the trial of the case; said remarks of the court, it is claimed, were prejudicial to the rights of the defendant.

The prosecuting witness, Lilly Green, testified that she had lived in Omaha from 1922 until October, 1933, and had worked for several Omaha concerns. She testified that, in the forenoon of May 16, 1932, defendant and her husband drove out to their home, and the defendant said that her husband and he were in Des Moines the day before, and that the defendant had written and had cashed a check on an Omaha bank in Des Moines, and if he did not get the money in the Omaha bank to meet it it would make him a lot of trouble. Defendant said

that "Hank," her husband, had told him that she had money in the Occidental Building & Loan Association, and he wanted to borrow it, and offered to pay interest, and also offered to assign an interest in some of the damage cases which they had, which offer she refused. Defendant then offered to give her a mortgage on his house. She replied that she would not take a mortgage on the house unless it was clear, and the defendant told her it was clear, which the defendant absolutely denies in his evidence. The parties then drove down town, and parked the car on the east side of the courthouse. Defendant got out of the car and Mrs. Green went to the savings department of the First National Bank and drew out $700, and then went to the Occidental Building & Loan Association, where the defendant and her husband were supposed to meet her.

The defendant on the witness-stand testified that he had lived in Omaha twelve years, was a married man and the father of two children, and had known "Hank" Green, who had been in his employ. He gave his version of the affair, as follows: That after he and Hank had cashed the check in Des Moines they talked over getting the money to make the check good, and Hank arranged for defendant to come out to the house and see Mrs. Green, and when he arrived there Hank said to him: " 'I have talked to Lillie and she will be down in a few minutes and she will talk to you.' Finally she came down and I said to her, I says, 'Lillie, I wrote a check in Des Moines to cover some expense we had to meet in Omaha, and we stayed there a day longer, and this check will be in and I haven't got the money to pay it, and Hank told me to go ahead and write it, that he would get the money from you for me to cover the check,' and I said, 'I will be willing to pay you for it, I will be willing to give you $50.' She says, 'That isn't enough, because I lose my interest, and I think I ought to have a little more. I ought to have at least 10 per cent.' She says, 'How long do you want this money for?' I says, 'Fifteen days,

because we have a case we are going to settle and I will be able to pay it. My fees will be more than sufficient to pay this check.' So we talked back and forth and she said, 'What kind of security can you give me?' I says, 'I will give you an assignment of four or five cases, of my fees, if you want it.' She says, 'No, I wouldn't care to have an assignment of fees. Something might go wrong with these cases and I wouldn't get my money.' I says, 'All right then, Lillie, I will give you a mortgage on our house out there. You know how I bought it. You know how much money I put into it since I bought it, about $1,800 or $2,000, and I figure my equity—' (interrupted) Mr. Crawford: Are you quoting your conversation now? A. (continued) Yes, sir. I says, 'You know I have a $5,400 first mortgage against the house, there is a second mortgage for $1,900 that I can buy for $100. Just as soon as I settle this case I am going to buy that second mortgage for $100. The third mortgage is wiped out, so that makes about $5,600 or $5,700 against the house.' "

He also testified that when they were sitting in his home he said: " 'Now Lillie, is this clear to you? You understand what you are doing?' She says, 'Yes; I do.' I says, 'If you are not satisfied with the collateral I am giving you, I would be glad to give you an additional mortgage on our furniture,' which at that time was clear. She says, 'No, I wouldn't think of it. I wouldn't want you to give any mortgage on your furniture.' "

Defendant further testified that they were good friends, and Hank and his wife were out at their house almost every night. Defendant testified that they drove back to the courthouse and Green went into the courthouse to look up the records to see if the mortgages were as the defendant had stated; that they waited about 20 minutes, and she asked her husband about how he found the records, and he said they were all right.

Commencing with question 202, the defendant attempts to lay the foundation for the impeachment of Mrs. Green

in the following manner: "Q. Did you have any conversation with Mr. Bailey,—now don't say what the conversation was, but answer yes or no,—with Mr. Bailey in his office here in Omaha in November, 1932? Mr. Crawford: Well, can't you fix the time a little better? Q. (continued) Do you remember having a conversation with Mr. Bailey? Mr. Crawford: That is objected to as immaterial, and an attempt, if anything, to impeach on an immaterial matter, a matter or conversation that took place some eight or nine months after the money was in the hands of the defendant. The court: I will sustain the objection. Mr. Prince: This conversation is a statement in which she told him that she knew the property,—(interrupted). The court: You can't impeach on cross-examination. Defendant excepts. Mr. Prince: Defendant now offers to prove by this witness, and that the witness would, if permitted to testify, say that in November, 1932, she had a conversation with Mr. Bailey in his office here in Omaha, and at that time and that place stated to the witness Bailey, 'I knew the place was not clear, but Mr. Goldman got it so cheap under foreclosure that I felt I was safe.' Mr. Crawford: Same objection to the offer. The court: I will sustain the objection. Defendant excepts."

The following also appears: "Q. Now did you not further make the statement at that time and place, 'I am going to have him arrested so as to force him to pay both Hank and myself what he owes both of us? Mr. Nye: I object to that as improper cross-examination. The court: Sustained. Defendant excepts. Mr. Prince: Defendant now offers to prove, and the witness would, if permitted to answer, testify 'Yes.'" Objection was sustained.

In the examination of the husband of the prosecuting witness, Henry D. Green, on cross-examination in reference to the check, being defendant's exhibit 3, given to Henry D. Green in Des Moines by the defendant, defendant's counsel asked question 306: "Did you ever see that

check before?" The court sustained an objection. The defendant offered to prove that the witness, if allowed to answer, would state that he had seen the check before, and that it was his signature on the back of the check. In sustaining the objection, the court said: "I don't think your offers to prove on cross-examination are good, Mr. Prince. You don't know whether the witness would answer that way or not, and have no means of knowing."

"So far as the cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review." *Langley v. Wadsworth,* 99 N. Y. 61.

"In cross-examination, an adverse party is usually allowed great latitude of inquiry, limited only by the sound discretion of the court, with a view to test the memory, the purity of principle, the skill, accuracy, and judgment of the witness; the consistency of his answers with each other, and with his present testimony; his life and habits, his feelings towards the parties respectively, and the like; to enable the jury to judge of the degree of confidence they may safely place in his testimony." *Hathaway v. Crocker,* 7 Metc. (Mass.) 262.

"A witness may always be subjected to a strict cross-examination, as a test of his accuracy, his understanding, his integrity, his biases, and his means of judging." *Perkins v. Adams,* 5 Metc. (Mass.) 44.

"It is no doubt competent for the party to put almost any question, upon cross-examination, which he may consider important to test the accuracy or veracity of the witness." *Stevens v. Beach,* 12 Vt. 585.

There is no question but that the cross-examination was too much restricted by the trial court. It was prejudicial error for the trial court to refuse to allow the defendant

to lay a foundation for the impeachment of Mrs. Green on cross-examination. The trial court repeatedly said that the defendant had no right to impeach on cross-examination. This is not the law. The defendant had a right to lay the foundation for impeachment by cross-examination of the witnesses on the stand. This is particularly true when the matter of intent or reliance is essential to a conviction in a criminal case. Defendant had the right to put these questions to the witness and in case of a negative answer to subsequently call persons as witnesses who could testify to the contrary.

When testimony is given by a witness on direct examination, from which an inference of fact arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right, and a denial of that right is sufficient ground for reversal. *Larson v. Hafer,* 105 Neb. 257; *Vassar v. Chicago, B. & Q. R. Co.,* 121 Neb. 140; *Union Nat. Bank v. Moomaw,* 106 Neb. 388; *Olson v. Peterson,* 33 Neb. 358; *Olive v. State,* 11 Neb. 1; *Blenkiron v. State,* 40 Neb. 11; *Davis v. State,* 51 Neb. 301.

"It is not sufficient that there is a false pretense; the owner of the property must rely on it; the pretense must be an effective cause in inducing the owner to part with his property. Therefore, if the owner has knowledge of the truth or does not believe the pretense, or, although believing it, yet parts with the property on some other inducement, or investigates it and parts with the property, relying entirely on the results of his investigation, the offense has not been committed. But although the owner makes some investigation of the representations made by the accused to ascertain their truth, yet if he nevertheless would not have parted with the goods but for such representations, believing them true, accused is guilty." 25 C. J. 599. See, also, *Mason v. State,* 99 Neb. 221; *McDonald v. State,* 124 Neb. 332.

The trial court refused several instructions offered by the defendant, one of which reads as follows: "You are instructed that if the complaining witness in this case before the payment of the money, made an independent investigation to determine what were the facts and relied upon such independent investigation so made, then your verdict must be for the defendant not guilty, or if upon all of the evidence in this case you have a reasonable doubt upon that proposition, then your verdict must be for the defendant, not guilty."

The court gave no instruction of its own motion in any way touching upon the matters involved in the one set out above.

It is error to refuse a proffered instruction, which is warranted by the evidence and correctly states the law of the case, unless the principles of law involved are covered by other instructions given. *Hyndshaw v. Mills,* 108 Neb. 250; *Strubble v. Village of DeWitt,* 81 Neb. 504; *Severance v. Melick,* 15 Neb. 610.

Defendant sharply objects to many remarks and statements made by the trial court in the presence of the jury during the conduct of the trial; among them, instead of simply ruling on an objection, the trial court adds, "It don't make any difference."

Question No. 161 was: "Now, do you know where your husband went in the car?" Objection was made, and the attorney for the defendant stated to the court: "She has testified what she relied upon, and I am entitled to show every fact and circumstance to show that she didn't rely on it, as a matter of cross-examination I think if your honor will consider that for a moment, you will see where I am positively right." The court, in the presence of the jury, then made the statement, "No, no, that is absurd."

Defendant complains of another ruling where the court peremptorily ordered, "Answer the question." The harm in this would depend entirely upon the tone of the voice and the manner in which it was said; if this court had

a phonograph record of it, we might realize, as the defendant insists, that it implied to the jury that the trial court was taking too personal a part in the contest waging before him, and "did not display that scrupulous regard for the rights of the defendant which a trial judge should display." However, on the other hand, the trial court, in a desire to hurry the proceedings, may simply have told the witness to answer the question, without first formally ruling on the objection, with no other thought than simply to speed up the trial.

It is, of course, better practice for a trial court to simply rule upon an objection without commenting on the evidence before the jury; however, a remark which does not express an opinion on the weight of the evidence is not prejudicial error. It is the rule in federal courts that a trial judge is authorized, if he thinks it will assist the jury, to express his opinion on a question of fact. However, this is not yet the rule in the courts of this state, where it is considered unwise for the trial court to support his ruling by making significant remarks to the jury. In general, "The judge should, during the course of a trial, refrain from remarks that are calculated in any way to influence the minds of the jury." 26 R. C. L. 1026, sec. 27.

Defendant charges misconduct of prosecuting attorney in his argument to the jury. This is not ordinarily ground for reversal where admonitions were given by the trial court to the jury to consider no statements not supported by the evidence.

After carefully considering the prejudicial errors in this record, we have reached the conclusion that the defendant was not given a fair trial, as required by law, and the sentence is hereby set aside and the judgment reversed, and a new trial ordered.

REVERSED.

EBERLY, J., concurring separately.

I concur in the foregoing opinion, but respectfully call

attention to the fact that the questions involved in the application of sections 20-1201, 20-1203, and 20-1204, Comp. St. 1929, to the facts in this case, or to the cross-examination challenged herein, as disclosed by the record before us, were not raised in the trial court by appropriate objection or otherwise, and are not considered nor decided in the present opinion.

HAROLD W. GLISSMANN, APPELLANT, V. CHARLES B. MCDONALD, SHERIFF, ET AL., APPELLEES.

FILED APRIL 5, 1935. NO. 29205.

1. **Judgment.** When certain devisees under a will appoint a trustee who brings an action in their behalf, they are all bound thereby under section 20-304, Comp. St. 1929.
2. **Liens.** In order to establish an equitable lien by agreement, it must clearly appear that it was the intention of the parties to charge a particular fund with a lien.
3. **Assignments.** A mere naked promise to repay money to be borrowed in the future, out of a possible inheritance from the estate of a father still living, does not create a lien thereon.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

S. L. Winters, for appellant.

Votava & McGroarty and *George Boland, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ.

PAINE, J.

This is an action to enjoin the sheriff, and also the assignee of the judgment, from collecting said judgment by execution. The trial court denied the injunction, and plaintiff appeals.

Hans C. Glissmann had owned certain land west of Omaha for many years, and sold 108 acres on June 22, 1922, to the Happy Hollow Club for $85,000 on a contract of purchase, the deferred payments extending to

July, 1932, and the vendor agreed to give a warranty deed upon the completion of all payments.

Hans C. Glissmann died June 15, 1928, and at that time there remained $42,000 due from the Happy Hollow Club. In his will he left an undivided interest to the judgment debtor, Henry C. Glissmann, his son, who filed objections to the probate of the will.

On March 8, 1927, the Bank of Benson secured a judgment against said Henry C. Glissmann and Tena, his wife. On October 21, 1927, the Bank of Benson became insolvent. On December 29, 1930, George Boland, appellee herein, purchased and received assignment of the said judgment for $3,853.06 so secured by the Bank of Benson. On October 31, 1928, an execution was issued upon this judgment, and on the same day it was returned unsatisfied. On May 28, 1931, a second execution was issued thereon, and on June 10, 1931, a return was made, showing that the sheriff had levied upon the real estate set out therein, sold to the Happy Hollow Club, but that he had been enjoined from selling the property, and made a return without further action.

Said case was appealed to the supreme court, and our decision appears in *Bauermeister v. McDonald,* 124 Neb. 142, in which it was held that the defendant George Boland had a lien on the interest of Henry C. Glissmann in and to the above described real estate.

In pursuance of said opinion of this court, and on March 24, 1933, a third execution and order of sale were issued to the sheriff of Douglas county, directing him to levy and sell as upon execution any real estate belonging to Henry C. Glissmann and Tena E. Glissmann, and in pursuance thereto on March 31, 1933, he levied upon their interest in the land sold to the Happy Hollow Club, and the petition for injunction was denied.

On September 29, 1928, all of the devisees entered into a written contract, the substance of which was that they settled all their differences in the estate and appointed a trustee, F. H. Bauermeister, and gave him a contract

giving him general powers to collect the balance due from the Happy Hollow Club, including the right to enforce any collections by suit if necessary. It is clear that said trustee in the case of *Bauermeister v. McDonald, supra,* represented Henry C. Glissmann as one of the devisees, under section 20-304, Comp. St. 1929.

One of the questions to be decided in this case may be stated briefly as follows: That if an oral agreement is entered into in good faith between a husband and wife and her father that moneys loaned by the father to the husband will be repaid, and in the event that they are not repaid the father shall charge his daughter with the amount loaned her husband against her distributive share of his estate; and if, in addition, the husband on his part agrees that any sums so charged against the wife's share of her father's estate will be repaid to her out of his share in his own father's estate; under such a state of facts, is this agreement valid and enforceable, and is it a superior lien to a judgment subsequently obtained against the husband's share in his father's estate? The appellant contends that it is, and cites, among the cases in support thereof, *Dayton Spice-Mills Co. v. Sloan,* 49 Neb. 622, and *Farmers & Merchants Irrigation Co. v. Brumbaugh,* 77 Neb. 702.

On the other hand, the appellees insist that the evidence of Henry C. Glissmann and Tena, his wife, does not support the claim made, for although her father, Henry Kuehl, did loan Henry C. Glissmann various amounts, there was no legal agreement on the husband's part that she should have a lien on his share of the property coming to him from his father's estate. In response to the question, "What did he promise?" Tena Glissmann made answer, "That he would pay me back if he ever had anything, and we inherited anything that he would pay me back."

Can it now be successfully contended that at that time Henry C. Glissmann could know whether he would ever get anything out of his father's estate, as his father was

then living? It is our opinion that this language falls far short of creating an equitable lien or ownership in Tena E. Glissmann on the property inherited by Henry C. Glissmann.

In *Mihan v. Great Western Sugar Co.*, 121 Neb. 109, this court set out that, among the requisites to establish an equitable lien, it must first clearly appear that it was the intention to charge a particular fund with the lien; next, that there was a distinct appropriation of that fund *pro tanto* by the one entitled to it, and that this should be done by giving an order on a specific fund, or transferring it so that the holder of the fund is authorized to pay it directly to the assignee without any further intervention. In other cases it has been held that a mere naked promise to pay an existing debt out of a particular fund, unaccompanied by any words of transfer, does not operate to create a lien thereon or work an equitable assignment thereof. *Phillips v. Hogue*, 63 Neb. 192; *Smedley v. Speckman*, 157 Fed. 815.

Henry C. Glissmann assigned all his interest in his father's estate to his wife, Tena E. Glissmann, for a consideration of $11,000, in part satisfaction of a debt he owed her of $17,000, and on November 3, 1930, Harold W. Glissmann, their son, secured an assignment from his mother of all of her interest therein, and for that reason is the sole appellant herein. The estate of Hans C. Glissmann was closed March 9, 1929.

The evidence also indicates that up to the time of his written assignment to his wife, Tena, on October 15, 1928, Henry C. Glissmann exercised full control over the property in his father's estate which he had inherited. The appellant insists that he had made this transfer to his wife, Tena, prior to the time the judgment of the Bank of Benson attached thereto, and insists that the judgment was not a specific lien, but merely a general lien, subject to all prior liens, whether legal or equitable; that the lien merely conferred the right to levy on the real estate of the judgment debtor to the exclusion of

other adverse interests subsequent to the judgment, and cites in support thereof *Metz v. State Bank of Brownville,* 7 Neb. 165.

But section 20-1504, Comp. St. 1929, provides that the property of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the day on which such judgment is rendered, and that a judgment shall be considered rendered when it has been entered on the judgment record, and it is also a rule that the lien of a prior judgment attaches the instant the judgment debtor acquires the property. The bank secured this judgment on March 8, 1927.

In *Bauermeister v. McDonald, supra,* it was held that the lien of the judgment had attached to the extent of the share of the unpaid purchase money on that share of the contract which was devised to Henry C. Glissmann by his father, Hans C. Glissmann. It must also be considered that Tena E. Glissmann is a judgment debtor as well as her husband, Henry C. Glissmann, and in that decision this court also held that the proper procedure was to levy an execution, which the sheriff, appellee, attempted to do in this case in strict accordance with our former decision.

It is further insisted by the appellees that in the former case trustee Bauermeister should have set forth all of the reasons why the defendant Boland had no lien on the property, and that the appellant is now estopped to assign different and additional reasons to sustain these contentions, as Bauermeister in the former case represented the Glissmanns therein. *Dutch v. Welpton,* 121 Neb. 480.

In our opinion, the appellant does not have a lien on this interest of Henry C. Glissmann in the property attached superior to the judgment lien of George Boland, appellee, who is entitled to levy an execution thereon. Finding no error in the record, the action of the trial court is hereby

AFFIRMED.

ERNEST BRANZ, APPELLANT, V. RAY R. HUTCHINSON ET AL., APPELLEES.

FILED APRIL 11, 1935. No. 29179.

Contracts. The proviso in section 36-301, Comp. St. 1929, inserted by amendment in 1927 (Laws 1927, ch. 36) does not apply to contracts entered into before the act took effect.

APPEAL from the district court for York county: HARRY D. LANDIS, JUDGE. *Affirmed.*

C. E. Sandall and *Charles F. Stroman,* for appellant.

Kirkpatrick, Good & Dougherty, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

GOSS, C. J.

October 30, 1926, Ernest Branz, plaintiff and appellant, leased a 200-acre farm to Ray R. Hutchinson from November 10, 1926, to March 1, 1932. The written lease was not recorded in the office of the county clerk until February 9, 1931. By its terms the tenant was to pay a cash rent of $150 each year for the pasture and was to deliver the landlord's two-fifths of the grain at market at Gresham, free of expense to the landlord. The lease was complied with until the fall of 1931 when the tenant failed to pay the cash rent for that last year and failed and refused to gather some of the landlord's share and to deliver more corn belonging to the landlord. The landlord gathered and delivered said corn. The tenant in December, 1931, and in March, 1932, sold and delivered to two grain companies in Gresham corn raised on the land in 1931, valued at $199.85. When a controversy arose as to the ownership of these products, the grain companies paid the money into court where, by stipulation of the parties, it abides the result of this suit.

On June 19, 1931, Hutchinson gave to Blanche Davidson his note for $500 and, to secure it, gave her his chattel mortgage upon the then growing crops, raised on the leased premises, which mortgage was duly recorded.

The lease from Branz to Hutchinson expressly provided that the tenant should "secure the performance of the terms and conditions of this lease on his part by giving to the first party on demand a chattel mortgage upon all or any part of the crops growing or gathered on said premises during said term." However, the evidence shows (by stipulation) that the landlord never made any demand for such a mortgage. He had no chattel mortgage.

This suit is a controversy between the landlord, Branz, and the chattel mortgagee, Davidson, for priority of lien against the fund in court. The district court gave judgment to the chattel mortgagee. The landlord appealed. In effect Hutchinson is out of the picture. The cause was tried to the court without a jury.

Section 36-301, Comp. St. 1929, as theretofore existing, had been amended by the legislature in 1927. Laws, 1927, ch. 36. The amendment inserted into the section as theretofore existing this provision: "Provided, that the filing of a lease containing an agreement for the execution of a chattel mortgage, or, therein constituting a chattel mortgage, on unplanted crops shall constitute notice of such an obligation and lien and protect the lessor against chattel mortgages given to other creditors by the lessee."

The question for determination in this case is the proper interpretation of chapter 36, Laws 1927, and the application thereof to the facts in this controversy. The act was entitled "An Act to amend section 2550, Compiled Statutes of Nebraska for 1922, relating to chattel mortgages; providing that the recording of a lease containing an agreement for a chattel mortgage on unplanted crops shall constitute notice; and to repeal said original section." It was passed and approved, without the emergency clause, on April 12, 1927, and became effective July 23, 1927. Its sole effect was to add to the section amended (now section 36-301, Comp. St. 1929) the words contained in the proviso hereinbefore quoted. We assume that the addition which the legislature endeavored to

provide was limited to "protect the lessor against chattel mortgages given to other creditors by the lessee." The amendment relates only to the effect of filing of chattel mortgages and leases as notice. It does not purport to cover questions relating to the validity of the instruments between the parties.

In *Brown v. Neilson,* 61 Neb. 765, we held that a lien reserved by a lease, in the nature of a chattel mortgage, on unplanted crops, "is ineffectual to create a lien, legal or equitable, in favor of the lessor for rents due and in arrears, on the crops grown thereafter on the leased premises."

In the *Brown* case the action was between the lessor and lessee, both of whom, at all times, had actual knowledge of the provisions of the lease. One reason suggested for this determination, advanced by Cobb, J., in *Cole v. Kerr,* 19 Neb. 553, and approved at page 773 in the *Brown* case, is: "Soil alone does not produce crops of corn in this degenerate age, if it ever did. It now requires in addition to soil, seed and labor, both of man and beast. So that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed—something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us." See, also, *Robinson v. Stricklin,* 73 Neb. 242.

In *Battle Creek Valley Bank v. First Nat. Bank of Madison,* 62 Neb. 825, it was held:

"An instrument which assumes to convey or encumber a thing not *in esse* is a mere executory contract, which does not, 'without a new intervening act,' create any legal right to, or interest in, the thing to which it relates.

"A provision in a mortgage of domestic animals, assuming to give the mortgagee a lien upon the increase to

be thereafter begotten, is nothing more than an agreement for a lien which, without possession, vests no legal right to, or interest in, such increase."

See, also, *State Bank of Gering v. Grover,* 110 Neb. 421.

It would seem obvious, under the foregoing authorities, that disabilities or limitations which inhere in, or are of the essence of, contracts which pertain to property not *in esse* are in no manner removed or remedied by legislation, the sole purpose of which is to charge third persons with constructive knowledge or notice of the existence of such contracts upon compliance with the provisons of such legislation.

As to the facts involved in the instant case, it may be said that on June 19, 1931, the tenant lessee gave a valid chattel mortgage to Davidson, defendant, to secure a $500 note. The tenant sold and delivered grain to the two grain companies. The purchase price of both deliveries amounted to $199.85. Both plaintiff Branz and Davidson asserted their respective liens against these purchasers, who paid the funds into court to abide the result of the suit. These purchasers were not chattel mortgagees, and, it is to be remembered, they were not within the purview of the restrictive words of the statute, "and protect the lessor against chattel mortgages given to other creditors by the lessee." Obviously, as one who purchases without constructive notice is presumed to be a purchaser without notice (*Rogers v. Pierce,* 12 Neb. 48), on this basis the lessor had no lien on the corn against these purchasers under the terms of the controlling statute, and constructive notice cannot be imputed to them. *American State Bank v. Keller,* 112 Neb. 761; *Weigand v. Hyde,* 109 Neb. 678; *State Bank of Gering v. Grover,* 110 Neb. 421.

It would seem the fair conclusion that the effect of the statutory language under consideration is but to make the chattel mortgagee the exception to the rule announced in the cases cited, which is otherwise continued in full force and effect. As to these purchasers it was

not filed for record. There is no question that the chattel mortgage given Davidson was valid at all times, and the prior filing of the same charged the purchasers with notice of it. The lessor must recover on the strength of his own title or lien against the purchasers of the corn in suit, and, if he fails, such failure cannot prejudice the subsequent chattel mortgagee as against the purchasers of the property covered by his mortgage.

But, waiving the effect of the situation above suggested, it may be said that security contracts have been the subject of legislative consideration, and legislation on this subject, though now comprised in a number of separate sections and provisions, constitutes a special subject, enacted for a special purpose, and evidencing a definite legislative policy.

Thus, in section 36-208, Comp. St. 1929, we have provisions governing when the vendor is secured by a sale upon condition; in section 36-301 we have covered the situation when security is furnished by the owner of the property in the form of a chattel mortgage. The legislative object and purpose in both is to provide security for the creditor party to this contract by a claim upon property involved. It is clear that the situation demands a similar rule of construction applicable alike to each of the sections in determining whether these respective provisions are to be deemed prospective or retrospective in their application.

In *Blunk Bros. v. Kelley,* 9 Neb. 441, after the adoption of what is now section 36-208, in a case in which a conditional contract entered into before the adoption of this legislation had not been filed as required by its terms, this court held the act inapplicable to contracts existing at the date of its passage. In delivering the opinion of this court, Maxwell, C. J., said, in part: "Has the statute changed the law as to contracts existing at the time of its passage? We think not. The contract in question was valid at the time it was entered into, and the title of the property in question did not pass to the vendee until pay-

ment of the amount due the plaintiffs. The legislature, in the passage of the act of 1877, did not attempt to apply the same to existing contracts."

Reading section 36-208 in connection with 36-301, as it existed before the amendment, in view of legislative policy and purpose evidenced, what possible reason can be suggested for the application of a different rule of construction as to the retroactive application of the statute involved in the case at bar.

We do not feel that we are going too far afield in thus construing sections 36-208 and 36-301 together. A statute will be read in connection with all other enactments upon that subject. *State v. Omaha Elevator Co.*, 75 Neb. 637; *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111; *Chappell v. Lancaster County*, 84 Neb. 301; *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607.

Nor does it appear that the clause under consideration is to be given any different construction because of its subsequent adoption as an amendment. "The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form." *State v. Hevelone*, 92 Neb. 748.

If this present section 36-301 had been originally enacted as an entirety in 1866, would it suggest a retroactive construction in the light of the principles announced in *Blunk Bros. v. Kelley*, 9 Neb. 441? It would seem the contrary would be the inevitable conclusion.

Indeed, the general rule appears to be that, where an amendment leaves certain portions of the original act unchanged, such portions are continued in force with the same meaning and effect they had before the amendment. So, where an amendatory act provided that an existing statute should be amended to read as recited in the amendatory act, such portions of the existing law as are retained either literally or substantially are regarded as a continuation of the existing law and not a new enactment. 59 C. J. 1097.

"In accordance with the rule generally applicable to

legislative enactments, unless required in express terms or by clear implication, an amendatory act will be construed prospectively and not retrospectively, and the parts not altered are considered as having been the law from the time they were enacted. So also where a statute, or a portion thereof, is amended by setting forth the amended section in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted, and the new provisions or the changed portions are to be understood as enacted at the time the amended act takes effect and not to have any retroactive operation." 59 C. J. 1181.

"(a) General Rule Applicable.—(1) The rule of statutory construction that the statute operates prospectively, unless its terms indicate a different intent, applies to an amendment. *Erie County v. Lowenstein,* 195 N. Y. Supp. 177, 202 App. Div. 579. (2) An amendatory act, like other legislative enactments, *takes effect only from its passage, and has no application to prior transactions* unless a contrary intent is expressed or clearly implied. *Riesen v. Riesen,* 105 N. J. Eq. 144; *In re St. Michael's Church of Atlantic City,* 76 N. J. Eq. 524.

"(b) Presumption.—There is a presumption that an amendment to a statute is prospective. *American Surety Co. of New York v. Alamo Iron Works* (Tex. Civ. App.) 29 S. W. (2d) 493 (rev. on other grounds (Commn. App.) 36 S. W. (2d) 714.)" 59 C. J. 1182, note 91 (a).

In this case the plaintiff must recover as against the purchasers of this corn in his own right or not at all. His contract ought not to be enlarged, by construction, to vest him with greater rights than those existing when the contract was actually entered into and made. It follows that the filing of the same, or a copy thereof, should not operate to vest him with any additional rights and powers that did not exist when he made the contract. To do so, it is admitted, would, in effect, impair the obligations of the contract in the constitutional sense of that term which would constitute a violation of the rights, not only of the

parties thereto, but also as to third parties who may be affected thereby.

The legislature did not attempt to apply the amendment of the chattel mortgage action (Comp. St. 1929, sec. 36-301) to existing contracts. The amendment was designed to affect only such contracts as were entered into after it took effect. *Blunk Bros. v. Kelley, supra.*

The judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. STATE BANK OF OMAHA, E. H. LUIKART, RECEIVER, APPELLEE: FRANCES C. MORGAN, INTERVENER, APPELLANT.

FILED APRIL 11, 1935. No. 29228.

1. **Statutory Provision.** Every material allegation of the petition, not controverted by the answer, shall, for the purposes of the action, be taken as true, except allegations of value or amount of damage. Comp. St. 1929, sec. 20-842.
2. **Banks and Banking:** SALE OF BONDS: RESCISSION. Where, by false and fraudulent representations of the vendor, a vendee has been induced to purchase bonds, he may rescind the sale, tender back the bonds, and recover the purchase price as a trust fund.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed, with directions.*

Reed, Ramacciotti & Robinson and *Crossman, Munger & Barton,* for appellant.

F. C. Radke, Barlow, Nye, W. A. Crossland and *Hanley & O'Brien, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

Mrs. Frances C. Morgan, intervener, in her petition in intervention alleged that she was induced by fraudulent

representations, made to her by the president of the State Bank of Omaha, to purchase from it certain bonds. She sought rescission, tendered back the bonds, and asked that the amount paid by her for the bonds be declared held by the receiver in trust for and restored to her. The receiver in his answer pleaded the statute of limitations, and denied certain allegations in the petition. A reply put in issue the allegations of the answer. The trial resulted in a judgment for the receiver. Intervener has appealed.

The receiver now admits that the plea of the statute of limitations is unavailing.

Intervener in her petition alleged that, upon the recommendation of an employee of the State Bank of Omaha, she went to it for the purpose of consulting its officers and managers concerning an investment; that at the bank she met its president and manager and explained to him that she was a widow, without business experience and without knowledge of what were safe and reliable securities or the value of the same, and must rely upon the advice of others in making any investment in securities; that she had a small amount of money which she desired to invest in safe securities; that the president treated her very cordially and stated that he had been well acquainted with her husband in his lifetime and, in substance, that they were intimate friends, and pretended great sympathy for intervener because of the loss of her husband; that she was impressed with the apparent honesty and truthfulness of the statements made by the president; that he thereupon advised her to purchase from said bank two bonds, issued by the Keystone Water Works Corporation, a corporation organized under the laws of the state of Delaware; that he exhibited to intervener said bonds, then owned by the bank, each for $1,000, and stated to intervener that said bonds were perfectly sound and good and would be paid at their maturity; that the interest represented by the coupons attached to the bonds would be promptly paid when due; that said corporation was wealthy; that it had an enormous business throughout the United States; that its

income annually was in the millions; that its assets were much greater than its liabilities; "that it was perfectly solvent and that for an investment there were no securities to be purchased anywhere that were better." Intervener alleged that she had no knowledge of said corporation, but relied wholly upon the statements made by the bank's president, purchased the bonds and paid therefor $2,028.75, being the face value of the bonds plus accrued interest; that the bank's assets were thereby augmented to the extent of the amount then paid by her, which remained in the hands of the bank up to the time that it was placed in the hands of the receiver, and still remains in the hands of its receiver. She further alleged that the statements were false; that, in fact, the corporation issuing said bonds, shortly before or immediately after the transaction between intervener and the bank's president, was placed in the hands of a receiver, and, at the time said statements were made to intervener, said corporation was insolvent and the bonds possessed no market or other value.

The only defense tendered in the answer was the plea of the statute of limitations and the following specific denial: "Defendant says that as to the matters and things alleged in said petition, in so far as they purport to set out any conversation or agreement had between the intervener and Albert L. Schantz, this answering defendant has no information, and therefore denies the same."

In her own behalf intervener testified concerning the transaction wherein she purchased the bonds. Her evidence, in the main, tended to support the allegations of her petition as to what occurred between her and the bank's president. The bank's president was the only witness called for defendant. He admitted there was a transaction wherein bonds were sold to intervener, but testified that he could not recall the conversation had between him and intervener, and did not remember what was said. His evidence, therefore, is practically of no value.

Section 20-842, Comp. St. 1929, reads: "Every material allegation of the petition not controverted by the answer,

* * * shall, for the purposes of the action, be taken as true; * * * Allegations of value or of amount of damage shall not be considered as true by failure to controvert them." Under this statute it is apparent that every material allegation in the petition that is not controverted by the answer, except allegations of value or amount of damage, for the purposes of the action must be taken as true.

From the record it appears that intervener was a woman of inexperience in business matters; that she had no knowledge of securities and knew nothing of the bonds in question, or their value. She informed the president of the bank of her want of experience and lack of knowledge and that she relied on the officers of the bank to see to it that she obtained good security. The president of the bank assumed to act as her adviser and immediately recommended the purchase of two bonds. The record shows that these bonds, instead of being "absolutely gilt-edge, nothing better," were those issued by a corporation then insolvent; that such corporation was then, or shortly thereafter, in the hands of a receiver. From the admission, it is clear that the bonds were not of the grade and character that intervener desired, and which the bank's president represented them to be. We are compelled to conclude that intervener was imposed upon and was knowingly taken advantage of for the purpose of enriching the bank at her expense by selling her some of its bonds, which were of little or no value, and obtaining full par value therefor.

The receiver insists that there is insufficient evidence to show that there was a confidential or fiduciary relationship existing. It is unimportant whether there was a fiduciary relationship existing. It is sufficient, for the purposes of this action, that, through deliberate fraud practiced upon her, intervener was induced to purchase bonds that were not what they were represented to be.

A vendor of bonds, representing them to be good, sound securities—none better—makes a representation of a fact and is liable to the vendee of the bonds if the maker of the

bonds is insolvent at the time, and the vendee may rescind the contract and recover the purchase price. *Crane v. Elder,* 48 Kan. 259; *Corbett v. Gilbert,* 24 Ga. 454; *Alexander v. Dennis,* 9 Port. (Ala.) 174; *Olvey v. Jackson,* 106 Ind. 286; *Burr v. Willson,* 22 Minn. 206; *Snyder v. Findley,* 1 N. J. Law, 48.

In *State v. State Bank of Omaha,* 126 Neb. 343, this court held: "In equity, a guaranty and a pledge of collateral securing it may be canceled for fraud in the procuring of those instruments, and in that event the collateral may be restored to pledgor as trust property in the hands of the receiver of the pledgee after insolvency."

In *Foley v. Holtry,* 43 Neb. 133, it was held: "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." In that case it was held that the injured party was entitled to rescind the contract. The decision in that case was reaffirmed in *Brucker v. Kairn,* 89 Neb. 274, and in that case it was held that false representations inducing the sale of personalty, if relied upon by the vendee, would support an action either for damages or rescission. Other decisions holding to the same tenor are *McCandless v. Greusel,* 103 Neb. 472, and *Olcott v. Bolton,* 50 Neb. 779.

In the instant case the bonds sold to intervener were not what they were represented to her to be. She relied upon the representations made and, under the law, she was entitled to rescind. She did rescind, tendered back the bonds, and demanded the return of her money, which the bank refused. She has since kept the tender good, and the bonds were tendered to the receiver in court.

The receiver contends that the value of the bonds was not shown and, therefore, the extent of intervener's injury was not shown. In an action to rescind, the extent of damage sustained is immaterial. Intervener was entitled to that for which she bargained; she was entitled to a first-class security. The evidence shows that the president

and manager of the bank told intervener that the bonds were gilt-edge, meaning that they were of the best class of securities on the market. She did not receive that for which she bargained. She was entitled to rescind regardless of the extent of her injury and damage. It does not require a Solomon to determine that bonds of an institution, which is insolvent and in the hands of a receiver, are not gilt-edge securities. The money intervener paid for the bonds still remains in the hands of the receiver. Under the facts disclosed, the receiver must be held to hold in trust the money paid by intervener to the bank, and she is entitled to preferential payment thereof, as for a trust fund, out of the assets of the bank in the hands of the receiver.

The judgment of the district court is reversed, and the cause remanded, with directions to enter a preferential judgment for a trust in favor of intervener for $2,028.75, plus interest thereon at 7 per cent. from March 5, 1930, to the date of entry of judgment, such judgment to bear interest at 6 per cent. from its date until paid.

REVERSED.

MINNIE E. RHOADS, APPELLANT, V. COLUMBIA FIRE UNDERWRITERS AGENCY ET AL., APPELLEES.

FILED APRIL 11, 1935. No. 29140.

1. Trial: DIRECTION OF VERDICT. A motion for a directed verdict made at the close of all the evidence may be informal, but the particular grounds upon which verdict is directed should be stated therein or in the direction of the verdict. This is to enable the court to pass understandingly on the motion, and to advise opposing counsel that he may, if possible, supply the defective or omitted evidence, if permitted to do so by the court.
2. ———: ———. Where, upon a jury trial, at the close of all the evidence, defendant moves the court for a directed verdict in his favor, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and all proper inferences to be drawn

therefrom; and if the evidence tends to sustain the allegations of the petition and the petition states a cause of action, the case should be submitted to the jury.

3. ———: ———. The trial court is not justified in withdrawing a case from a jury if there is competent evidence from which the alleged facts may be reasonably inferred.
4. Pleading. To maintain a civil action under our Code, it is not essential that the action be denominated either an action at law or in equity, nor that it be given any particular name. If the litigant pleads facts, and they constitute a cause of action or defense, the courts are bound to award the relief due.
5. ———. "The court will, when possible, sustain the theory intended by the pleader. But that a certain theory was evidently contemplated by the person who drew the pleading is of no avail as against the theory shown by the facts alleged." 49 C. J. 118.
6. Trial: DIRECTION OF VERDICT. Pleadings and evidence in the instant case examined, and *held*: First, that the trial court was not justified in sustaining the motion for a directed verdict on the grounds set forth therein; and, second, that the evidence tends to establish plaintiff's cause of action and requires submission of the issues to a trial jury.

APPEAL from the district court for Dawson county: ISAAC J. NISLEY, JUDGE. *Reversed, with directions.*

Frank M. Johnson and *Craft, Edgerton & Fraizer,* for appellant.

Wells, Martin, Lane & Offutt, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

EBERLY, J.

This is a civil action for the recovery of money only, brought by the plaintiff against the defendants, who are engaged in the fire insurance business in the community in which plaintiff resides.

The allegations of plaintiff's petition may be summarized as being substantially as follows: That on July 18, 1930, plaintiff applied for, and received, a fire insurance policy insuring her farm buildings and the contents

thereof, situate on her farm in Dawson county, Nebraska, in the sum of $5,600, $3,000 of which was on the farm residence; that by agreement of the parties a mortgage clause was to be attached to said policy in favor of Trevett, Mattis & Baker Company of Beatrice, Nebraska; that the plaintiff paid the premium thereon, and the policy No. 548511 was duly issued as applied for, including the mortgage clause attached, and was transmitted direct to Trevett, Mattis & Baker Company, the mortgagee; that in said transaction the defendants were represented by one John C. Haley, as their agent, and that said "John C. Haley on September 30, 1930, and on July 18, 1930, and for a long time prior and subsequent thereto was the duly authorized agent of the defendants in their fire insurance business, consisting of securing applications, collecting premiums, mailing applications to Omaha office, delivering policies, making adjustments, and generally representing the defendants in and about Dawson county, Nebraska;" that on September 30, 1930, new improvements having been completed on plaintiff's residence and barn (covered by policy No. 548511), John C. Haley, as defendants' agent, came to plaintiff's premises, solicited and obtained an application in writing, upon the blanks furnished by defendants, signed by plaintiff, for additional insurance on the property previously insured, for a five-year period, in the sum of $900 on the residence, and $1,000 on the barn, this also to have a mortgage clause attached with loss payable to Trevett, Mattis & Baker Company, mortgagee, of Beatrice, Nebraska, and also at said time collected and received the premium due therefor, in the sum of $50.35, which the defendants have ever since retained; that plaintiff was orally assured by said Haley, during said transaction and as a part thereof, that "the insurance would be in force at 12:00 o'clock noon on the day following," and that the policy to be issued "would be transmitted direct to Trevett, Mattis & Baker Company, the mortgagee, and would bear a mortgage rider assigning to said mortgagee the plaintiff's interest in said insurance;" that plaintiff fully relied

upon the promises and agreements set forth, including the retention by defendants of the premium paid by her, and believed that the policy applied for had been duly issued by defendants, transmitted to, and was then in possession of, Trevett, Mattis & Baker Company as contemplated by her engagements with defendants; that plaintiff could and would have purchased the additional insurance from some other company had she not relied upon the acts and representations of defendants, made by John C. Haley as their agent; that by reason thereof the defendants and each of them "are now estopped from denying liability for any loss plaintiff has sustained in connection with the application taken on September 30, 1930, and the contract of insurance to be issued pursuant thereto," and furthermore thereafter in said pleading plaintiff refers to and bases her right of recovery from said defendants upon and by virtue of said contract of additional insurance; that on October 5, 1932, plaintiff's residence, the subject of the insurance contracts aforesaid, then of a value of not less than $5,000, was totally destroyed by an accidental fire; that plaintiff had duly performed all conditions on her part to be performed; that immediately after October 5, 1932, plaintiff notified defendants of her loss, and was for the first time informed that policy No. 548511, insuring the destroyed residence in the sum of $3,000 under the written application of July 18, 1930, was the only policy ever issued by them; that defendants denied all liability in the transaction evidenced in part by the written application of September 30, 1930; that thereupon defendants did pay the $3,000 insurance as provided by policy No. 548511, but have at all times refused, and still refuse, to pay the $900 additional insurance due plaintiff as herein alleged. Plaintiff prayed for judgment in the sum of $900, and interest, and attorney fees.

The sufficiency of this petition was in no manner questioned save in one particular. Defendants presented a motion asking that plaintiff be required to attach to her petition a copy of the application for the additional insurance, which motion was denied.

Defendants filed an answer consisting of: (1) A general denial; (2) an admission of the corporate capacity of each of the defendants, and that the Columbia Fire Underwriters Agency, Omaha, Nebraska, is the agent of the National Fire Insurance Company of Hartford, Connecticut, and authorized to write insurance for the defendant, said National Fire Insurance Company; (3) admit that the National Fire Insurance Company issued policy No. 548511 insuring plaintiff's property; (4) deny that any additional insurance was applied for, or that defendants accepted any application for additional insurance, or that any contract for additional insurance existed between plaintiff and defendants on October 5, 1932, at the time of the loss; (5) allege that the claim of plaintiff for $900, here in suit, has been fully settled, paid and discharged by defendants.

To this answer plaintiff filed a reply consisting of a general denial, and also matters controverting defendants' allegations of settlement.

The record further sets forth that a trial was had on the above issues in the district court for Dawson county to a jury duly impaneled and sworn. At this trial it was stipulated between the parties, as follows:

"That John C. (Jack) Haley was a duly authorized and acting local agent at Lexington, Dawson county, Nebraska, and the territory adjacent thereto, for the Columbia Fire Underwriters Agency of the National Fire Insurance Company of Hartford, Connecticut, * * * on July 18, 1930, and on September 30, 1930. That as such agent, the said John C. Haley was empowered to take and solicit applications for policies on farm properties, and that he was also authorized agent to write policies on city properties. That he was authorized to collect premiums on the applications taken on farm properties and the insurance written on city properties and remit the same to the defendants; and that he was, so far as the defendant companies were concerned in the above matter, the local agent of the defendant companies, with authority as above stipulated. That agent's license No. 32487 was issued to the said John C. (Jack)

Haley by the department of trade and commerce, bureau of insurance of the state of Nebraska on May 1, 1930, for the Columbia Fire Underwriters Agency of the National Fire Insurance Company of Hartford, Connecticut. That said license would not expire until April 30, 1931, and was not canceled during that year."

By virtue of these admissions, under the express terms of the statute, Haley, therefore, "shall be deemed to all intents and purposes an agent * * * of such company." Comp. St. 1929, sec. 44-307.

The applicable maxim here is: *"Qui per alium facit per seipsum facere videtur,"* "He who does an act through another is deemed in law to do it himself." Broom's Legal Maxims (9th ed.) 530.

For the purpose of this action, the application for insurance of September 30, 1930, must, therefore, be deemed to have been taken by defendants in their corporate capacity, and in that manner to have been received by them, together with the premium paid thereon, and that such application and moneys so received must be deemed to have been held and retained by and under their exclusive control without taking action thereon or giving any notification to plaintiff of the real situation until after October 5, 1932. 32 C. J. 1063; *Rankin v. Northern Assurance Co.*, 98 Neb. 172; *Cline v. Fidelity Phenix Fire Ins. Co.*, 113 Neb. 481; *Whitehall v. Commonwealth Casualty Co.*, 125 Neb. 16.

"In accordance with this rule the company is liable in damages for the fraud or other wrongful acts of its agent within the scope of his actual or apparent authority, such as failing or unreasonably delaying to send the application to the company." 32 C. J. 1064.

It may be said that plaintiff's evidence tendered and received generally sustained the allegations of the petition. Among other matters, plaintiff testified, in substance, that the insured residence was of the value of $5,000; that the premium of $50.35 paid to the company's agent at the time of signing the written application had never been re-

turned; that plaintiff believed that the policy had been issued as applied for, and had been transmitted by the insurance company to her mortgagee at Beatrice, Nebraska, in the same manner as agreed upon and as the previous policy No. 548511 had been, and that her first information on the subject to the contrary was received after the destruction of the insured premises on October 5, 1932. She also testified to facts tending to negative defendants' contention that the claim of $900 had been settled by them. Other evidence also was offered in plaintiff's behalf. On the foundation that the application of September 30, 1930, for the $900 additional insurance was made to the same party and on the same kind of blank as that employed in the application of July 18, 1930, the original application executed by plaintiff was admitted in evidence. This application is addressed to the Columbia Fire Underwriters Agency of the National Fire Insurance Company of Hartford, Connecticut. At the extreme top of this instrument, as a part of the original blank on which it was prepared, appear the printed words: "Subject to approval of said company and to terms and conditions hereof and of the policy that may be issued hereon." Further, plaintiff's evidence is that $50.35 was the correct amount at the regular established rates of insurance which prevailed in this community on this class of risks in September, 1930.

Defendants' evidence included testimony in substance that the course of business is such that, when an application for farm insurance is taken, the soliciting agent forwards it to the Omaha office for approval, and, if approved, a policy is issued and forwarded to the agent for delivery; that the office in Omaha is the only office in Nebraska which accepts or rejects applications for farm insurance and issues policies if they are accepted; that neither the application for the $900 insurance made by plaintiff, nor the premium of $50.35 paid by her, has ever been received at this office. Defendants also took issue on the value of the farm residence. Their testimony is that its replacement value at the time of the fire was but $3,394. How-

ever, in securing this result their expert had deducted as "depreciation" the sum of $848.50. The state agent of the Columbia Fire Underwriters Agency, who has supervision of the entire insurance business of the defendant companies, testified that, though the company does insure farm residences in excess of $3,000, that sum is the maximum amount, and one which the companies exceed only after a special examination of the premises insured. He further testified that, if the report on special examination had disclosed that the value of the farm residence involved was but $3,394, "we would not have issued the additional insurance on that valuation." This testimony was elicited after plaintiff had testified to a valuation of this building at not less than $5,000. This witness, the state agent of defendants, however, did not testify as to whether or not on the valuation of $5,000 the premises would have been insurable to the extent of $3,900. Defendants offered no testimony on this subject as applied to a $5,000 valuation. See 64 C. J. 713.

At the close of all the evidence the defendants moved the court in the alternative for a dismissal of the action, or that the jury be instructed to return a verdict for the defendants, "for the reason that it appears beyond dispute that Mr. J. C. Haley was only soliciting agent of the defendant companies and had no authority to make any contract of insurance involving farm risks, his authority being limited to the taking of applications and submitting them to the state agents at Omaha for acceptance or rejection; that the plaintiff knew of this limitation of the agent's authority and that the application must be submitted to the state agent for approval or rejection; that the evidence is further conclusive that the only application submitted to the state agents of the defendant companies was the application, dated July 18, 1930, and no subsequent application was ever submitted to the state agents or premium paid to them for any other or additional insurance, and no contract of insurance was made with the plaintiff other than the policy, No. 548511. And

the further reason why the motion should be sustained is, that the evidence here shows that, after the loss, the loss was fully adjusted for the sum of $3,750, and the amount of the adjustment paid to the plaintiff and mortgagee as full settlement of all claims against the defendant companies."

This motion the district court sustained, and pursuant thereto verdict was returned for defendants. The plaintiff appeals.

The gist of defendants' contentions was that in the present action plaintiff must establish, as basis for recovery, a valid contract for insurance, or a valid contract of insurance, neither of which, due to the limitation on the powers of Haley as soliciting agent, was ever made between the parties to this litigation, and, at all events, all claims of plaintiff, including those here in suit, were fully and finally settled by the defendants.

These contentions must be considered in the light of the requisites of defendants' motion for a directed verdict.

Briefly, the controlling principles on this procedure appear to be: "A motion for a directed verdict need not be in writing. It may be informal, and is frequently made by presenting to the court a peremptory instruction to be given or refused. *The particular grounds upon which verdict is directed must be stated in the motion, or in the direction of the verdict.*" (Italics ours.) 25 Standard Ency. of Procedure, 1068.

The reason for the requirement italicized above is given by the authorities substantially as follows: "It is due to the court and the opposing counsel that their attention should be called to the precise defect in the evidence or the omission of evidence that the party claims entitles him to the direction of the verdict. It is due to the court to enable it to pass understandingly on the motion, and it is due to counsel that he may, if possible, supply the defective or omitted evidence, if permitted to do so by the court." *Tanderup v. Hansen,* 8 S. Dak. 375. See, also, *Baker v. Joseph,* 16 Cal. 173; *Coffee v. Greenfield,* 9 Pac.

Coast Law Journal, 38; *Hanson v. Lindstrom,* 15 N. Dak. 584; *Smalley v. Rio Grande Western Ry. Co.,* 34 Utah, 423; *Gardiner v. Schmaelzle,* 47 Cal. 588; *Rayl v. Estate of Hammond,* 95 Mich. 22.

In the following cases this court has approved the reception of evidence tendered by a party after a decision against him involving an issue similar to that presented here. *Dunn v. Bozarth,* 59 Neb. 244; *Riley v. Missouri P. R. Co.,* 69 Neb. 82.

The conclusion would therefore appear to be justified that in the instant case the order of the trial court sustaining defendants' motion, and directing verdict should be approved, if at all, on the particular grounds set forth in the motion.

So, too, this jurisdiction is committed to the view that where, upon a jury trial, at the close of all the evidence, the defendant moves the court for a directed verdict in his favor, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and all proper inferences to be drawn therefrom; and if the evidence tends to sustain the allegations of the petition and the petition states a cause of action, the case should be submitted to the jury. *Curtice Co. v. Estate of Jones,* 111 Neb. 166; *Wheeler v. Abbott,* 89 Neb. 455.

Also, the trial court is not justified in withdrawing a case from a jury if there is competent evidence from which the alleged facts may be reasonably inferred. *Oleson v. Oleson,* 90 Neb. 738.

The question as to whether the petition in the instant case states a cause of action, and the nature of the cause set forth, if any, is of course to be determined by a proper construction of our Code provisions. It is provided by section 20-101, Comp. St. 1929, that "there shall be * * * but one form of action, which shall be called a 'civil action.'"

Section 20-501 provides: "A civil action must be commenced by filing in the office of the clerk of the proper

court a petition, and causing a summons to be issued thereon."

Section 20-803 provides, in part: "The only pleadings allowed are: First. The petition by the plaintiff."

Section 20-804 reads as follows: "The petition must contain: First. The name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant; Second. A statement of the facts constituting the cause of acton, in ordinary and concise language, and without repetition; Third. A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated."

In the construction of these Code provisions, "It must be borne in mind that the word 'facts,' as used in the Code, * * * means a narrative of the events, acts, things done, etc., which show a legal liability of the defendant to the plaintiff." Further, that "A petition * * * is sufficient if, from the naked statement of facts therein, the law will entitle the plaintiff to recover thereon." And that "The legal effect of the facts pleaded need not be stated as at common law, as it is the duty of the court to apply the law to such facts." Maxwell, Code Pleading, 76, 77.

So, also, "No issue can be framed upon an allegation as to the law. Facts only are pleadable, and upon them, without allegation, the courts pronounce and apply the law." Maxwell, Code Pleading, 106.

Thus, in *Alter v. Bank of Stockham*, 53 Neb. 223, this court announced the doctrine: "To maintain a civil action under our Code, it is not essential that the action be denominated either an action at law or in equity, nor that it be given any particular name. If the litigant pleads the facts, and they constitute a cause of action or defense, the courts are bound to award the relief due." See, also, *Hopkins v. Washington County*, 56 Neb. 596; *Gilbert v. Rothe*, 106 Neb. 549.

Under the Code provisions quoted, interpreted in the

light of the foregoing authorities, the cause of action sued upon in the instant case embraced only the ultimate facts set forth in plaintiff's petition. In other words, it is properly restricted to the "narrative of the events, acts, things done, etc.," which made up the factual transaction out of which the litigation proceeds.

But in the instant case the plaintiff, in truth, after setting forth the ultimate facts constituting her cause of action, added thereto her conclusion as to the legal effects of the facts so pleaded. This was, as we have seen, obviously a violation of the accepted rules of Code pleading. For, upon the sole foundation of such ultimate facts so pleaded, in effect she charges that thereby a contractual relation was created between plaintiff and defendants and was broken, entitling her to recover. The result of traversing this allegation was a futile attempt to frame an issue of law. But no issue in Code pleading, where by statute the pleader is restricted to "a statement of the facts constituting the cause of action in ordinary and concise language, and without repetition," can be framed on an allegation in a petition as to the law. Maxwell, Code Pleading, 106.

"The court will, when possible, sustain the theory intended by the pleader. But that a certain theory was evidently contemplated by the person who drew the pleading is of no avail as against the theory shown by the facts alleged." 49 C. J. 118.

This, in turn, is quite in conformity with the spirit of our Civil Code, which requires: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Comp. St. 1929, sec. 20-853.

Therefore, in the instant case, the allegations relative to the creation of a contractual relation must be regarded as mere surplusage, and so far as questions of pleading are concerned, the correctness of the trial court's action must be determined in the light of the ultimate facts alleged in the petition.

We do not take issue with the contention of defendants that the allegations of the petition, properly considered, and the proof in support thereof, under the long-established rule in Nebraska, do not establish the existence of a contract between the insurance company and plaintiff. *St. Paul Fire & Marine Ins. Co. v. Kelley,* 2 Neb. (Unof.) 720; *Johnston v. Indiana & Ohio Live Stock Ins. Co.,* 94 Neb. 403; *Handlier v. Knights of Columbus,* 106 Neb. 267; *Muhlbach v. Omaha Life Ins. Co.,* 107 Neb. 206; *Farmers & Merchants Ins. Co. v. Graham,* 50 Neb. 818. But we are also of the opinion that, in consideration of the ultimate facts pleaded, and the evidence in the record sustaining plaintiff's action, this proceeding is not based on a strictly contractual liability, but is a "tort action," as that term is commonly employed. The facts in the instant case, therefore, invoke the application of the principles announced by this court in *Strand v. Bankers Life Ins. Co.,* 115 Neb. 357. That case involved a transaction in life insurance, but the principles announced therein by Rose, J., in delivering the opinion of the court, are equally applicable to the case now before us. Judge Rose there said in part:

"Plaintiff did not attempt to plead a cause of action for insurance, but confined his remedy to damages for negligence. An action based on negligent failure of a life insurance company to act promptly on an application for insurance after a conditional payment of the premium is comparatively new in the law of insurance. There is a diversity of opinion on the subject. In *National Union Fire Ins. Co. v. School District,* 122 Ark. 179, L. R. A. 1916 D, 238, the opinion contains the following:

" 'The better reason and the decided weight of authority supports the doctrine that mere delay in passing upon an application for insurance cannot be construed as accepting such application and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay.'

"*Interstate Business Men's Accident Ass'n v. Nichols,* 143 Ark. 369, seems to be a case of like import. Judge

Cornish took the same view in *Meyer v. Central States Life Ins. Co.*, 103 Neb. 640, 644.

"On the contrary, a right of action for negligence in failing to act promptly on an application for insurance has been recognized by some of the courts of last resort. *Wilken v. Capital Fire Ins. Co.*, 99 Neb. 828; *Duffie v. Bankers Life Ass'n*, 160 Ia. 19; *Johnson v. Farmers Ins. Co.*, 184 Ia. 630; *Boyer v. State Farmers Mutual Hail Ins. Co.*, 86 Kan. 442. Cases on both sides of the question are discussed by the supreme court of Illinois in an opinion reported and annotated in 15 A. L. R. 1021, under the title of *Bradley v. Federal Life Ins. Co.* The case is reported also in 295 Ill. 381.

"The view that there is a remedy based on negligence seems to be founded on reason and justice. The receipt in the present case shows on its face that the insurance company, without assuming any insurance risk, accepted conditionally the first annual premium. The transaction makes the insurance company applicant's trustee for the return of the premium if the application is rejected and for the unconditional acceptance of the premium if the application is approved and the policy delivered. In connection with the application the receipt implies time for a proper investigation of the risk under consideration. Good faith and fairness of both parties are required in negotiations for insurance. The retaining of the money of the applicant beyond a reasonable time would deprive him of its possession and use during the delay. The use of the money or interest thereon is a valuable right. Negligent or inexcusable delay on the part of a trustee is a wrong, if it deprives the beneficiary of the use of a trust fund which has served its purpose as such. The receipt, the application and the report of .the examining physician imply a duty on the part of the insurance company to act on the proposed risk within a reasonable time under the circumstances surrounding the negotiations. In addition, an unreasonable delay and the retention of an unearned premium might deprive an insurable applicant of an op-

portunity to apply elsewhere for and to procure life insurance. Furthermore, an insurance company transacts business under a charter from the state. It is now recognized that insurance is affected with a public interest. It is regulated by the government for the protection of the insuring public. The privilege of an insurable person to apply to a licensed insurer for insurance is a vital feature of domestic life as well as of the industrial world. The possession of a premium held by an insurance company as a trust fund, without any obligation for insurance prior to the issuance and delivery of a policy, imposes the duty of acting on the application within a reasonable time. The conclusion therefore is that there is a remedy in the form of an action in tort for an unnecessary and negligent delay in performing such a duty, if it prevents an insurable applicant from procuring a policy which he would otherwise have received, thus causing a loss."

In the instant case the "ultimate facts" do not constitute a claim for insurance, but invoke a remedy for damages for failure of the insurance companies to promptly and seasonably perform the duty which these facts, in view of the nature of the business of the companies, imposed upon them. Under the principles announced in *Strand v. Bankers Life Ins. Co., supra,* on the record in the instant case, plaintiff was entitled to relief, the extent of which, under the evidence, was a proper question for the determination of the trial jury.

The settlement of this cause of action, claimed by the defendants, cannot be sustained. Their liability for the amount paid by them for the loss covered by their policy No. 548511 was, at the time of the alleged compromise, unquestioned. It was an existing legal and moral obligation. The rule is that the performance of, or promise to perform, an existing obligation is not a valid consideration. For lack of sufficient consideration the claimed settlement of the "additional insurance" is, therefore, wholly invalid. 13 C. J. 351; *Armann v. Buel,* 40 Neb. 803; *Esterly Harvesting Machine Co. v. Pringle,* 41 Neb. 265; *Allen v. Plasmyere,* 3 Neb. (Unof.) 187.

It appearing, therfeore, that the "particular grounds" stated in defendants' motion for a directed verdict were wholly without support of controlling facts in the record before us, and wholly inapplicable thereto, and that the pleadings and evidence fairly established a controversy for the determination of the trial jury, the district court erred in sustaining such motion and in entering judgment for the defendants.

The judgment of the trial court is reversed and the cause remanded for further proceedings in harmony with this opinion, with directions to permit the parties, on application, to amend their pleadings to conform to the law of the case herein declared.

REVERSED.

FIRST TRUST COMPANY OF LINCOLN, TRUSTEE, APPELLEE, V. MARY BAUER ET AL., APPELLANTS.

FILED APRIL 11, 1935. No. 29243.

1. **Mortgages:** RECEIVERS. "Ordinarily, a receiver will not be appointed in a foreclosure suit, when the mortgaged property is the homestead of the mortgagor." *Laune v. Hauser*, 58 Neb. 663.
2. ———: HOMESTEAD. An apartment house on a lot contiguous to the one on which the mortgagor dwells in a house containing several apartments which are leased to tenants is not a part of mortgagor's homestead as contemplated by section 40-101, Comp. St. 1929.
3. **Homestead.** As between mortgagor and mortgagee, the homestead means the actual home of the family including the lands and buildings constituting the same.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Herman Ginsburg, for appellants.

Stewart, Stewart & Whitworth, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

DAY, J.

This is an appeal from an order appointing a receiver in a mortgage foreclosure suit. The suit to foreclose the mortgage was commenced December 12, 1931, and a decree was entered November 20, 1933. The petition for the appointment of a receiver was filed January 8, 1934, and the appointment was made March 9, 1934.

The evidence justifies the appointment of a receiver. The affidavits as to the value of the property are in conflict. The amount due on decree and taxes was $19,396.41 when the receiver was appointed. From a consideration of the appraisals made by the witnesses, we conclude that the property would not sell for a sum sufficient to satisfy the judgment and the taxes.

Appellants contend that the property was a homestead and that the court should not have appointed a receiver for this reason. "The remedy of appointment of a receiver to take charge of the property in certain contingencies in an action of foreclosure of a real estate mortgage is not applicable where the mortgaged property is the homestead of the mortgagor, direct defendant in the suit." *Chadron Loan & Bldg. Ass'n v. Smith*, 58 Neb. 469. "Ordinarily, a receiver will not be appointed in a foreclosure suit, when the mortgaged property is the homestead of the mortgagor." *Laune v. Hauser*, 58 Neb. 663.

The mortgagor, John Bauer, now deceased, at the time of his death occupied with his family a house on lot 5. In this house were several apartments which were and now are rented to tenants. Lot 5 is a part of the mortgaged premises. On a contiguous lot, number 6, was a separate building containing a number of apartments which were always rented to tenants. It does not appear that there was any connection between the use of lot 5 and lot 6. The receiver was appointed to take charge of lot 6. None

of the family of the deceased mortgagor lived in the apartment house on lot 6.

Section 40-101, Comp. St. 1929, is as follows: "A homestead not exceeding in value two thousand dollars, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided."

Several cases are cited by appellant to the effect that two lots may constitute a homestead. *Storz v. Clarke,* 117 Neb. 488; *Norfolk State Bank v. Schwenk,* 51 Neb. 146; *Radbruck v. First Nat. Bank,* 95 Neb. 288. Other cases also cited describe a homestead as an apartment house in which mortgagor lives with his family (*Hess v. Eselin,* 110 Neb. 590); a hotel which was occupied by mortgagor (*Foltz v. Maxwell,* 100 Neb. 713); and property used for other purposes in addition to its use as a dwelling place (*Corey v. Schuster,* 44 Neb. 269). However, these cases do not control the instant one because the mortgagor and his family never occupied the premises, for which the receiver was appointed, as a home. It is as separate and distinct a property as though it were separated by miles instead of being contiguous. The larger apartment house is not an appurtenance of the smaller house. If lot 6 were a vacant lot and a part of the grounds appurtenant to the dwelling, it would then come within the rule of the cases cited. An apartment house on a lot contiguous to the one on which the mortgagor dwells in a house containing several apartments which are leased to tenants is not a part of mortgagor's homestead as contemplated by section 40-101, Comp. St. 1929.

This court recently said in reference to the homestead as between mortgagor and mortgagee: "It means the actual

home of the family including the lands and buildings constituting the same, and the possession and ownership of all of which may be successfully defended by either husband or wife during the marriage state against the independent acts of either, and against joint acts of either or both." *Storz v. Clarke*, 117 Neb. 488. Paraphrasing the language as applicable to this case, it reads: As between mortgagor and mortgagee, the homestead means the actual home of the family including the lands and buildings constituting the same. The larger apartment house on lot 6 is not the actual home of the family, nor is it included as lands and buildings constituting said homestead.

Another contention of the appellee is that the order of the court permitted the receiver to take possession of property not covered by the mortgage. It does not appear from the order that such is the case. Other assignments of error are waived because not argued in the briefs or a discussion is unnecessary to a decision of the case. There is no error in the judgment.

AFFIRMED.

GLEN T. GIBSON, ADMINISTRATOR, APPELLEE, V. MARY J. SHEEN, APPELLANT.

FILED APRIL 11, 1935. No. 29178.

1. **Witnesses.** The testimony of a married woman as to representations made by deceased mortgagee to induce her to bind her own property for the payment of her husband's debt was properly excluded under section 20-1202, Comp. St. 1929.
2. **Husband and Wife.** An extension of the time of payment of her husband's past-due indebtedness is a sufficient consideration to support a wife's contract to bind her separate estate for the payment thereof.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Nye & Nye, for appellant.

Miller & Blackledge, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

PAINE, J.

This is an action to foreclose a mortgage upon an undivided one-sixth interest in the northwest quarter of section 6, township 8, range 10, Adams county, Nebraska.

Mike Sheen and Mary J. Sheen, his wife, had been farm tenants for many years of Chester Holloway near Gibbon, Nebraska, and were indebted to him for a large amount of back rent. On March 1, 1927, the tenants gave to their landlord a promissory note for the amount due of $1,176, with 8 per cent. interest. In this note there was the usual married woman's clause, binding the wife's individual estate for the payment thereof, and the mortgage accompanying the same conveyed as security therefor Mrs. Sheen's one-sixth interest in a piece of land which she had inherited from her parents. Her father died many years before, and her mother died some two years before the trial. At the time of the trial, both Mike Sheen and Chester Holloway, payee, had died, and the petition was filed by the administrator of the estate of Chester Holloway to foreclose the mortgage because of default in the payment of the note.

The answer admitted the signatures of Mike Sheen and Mary J. Sheen, and that nothing had been paid on the note. As a defense to the payment, it alleged that defendant was a married woman, wife of Mike Sheen, who died October 9, 1932, and alleged that she was illiterate, not being able to either read or write, and only just able to sign her name; that she only understood the commonest kind of household words; that she remembered signing some papers, but did not understand that they had any reference to her separate property; that no one explained to her the terms and conditions of either the note or mortgage, and that she could not read them, and alleged that Chester Holloway intentionally and fraudulently misrepresented the true nature and meaning of the papers, with the intent to cheat and defraud her; that what she

understood was that she was signing a new lease of the farm they rented from Holloway. She alleged that she received no consideration for signing the note and mortgage, and that she would not have signed them had she known that they referred to her separate property; and that her mother, Mary Jay, was the owner of the south half of the said northwest quarter of section 6 when the papers were signed, and that the defendant had no right, title, or interest in the land at the time of the execution of the note and mortgage.

For a reply the plaintiff denied all allegations in the answer inconsistent with the petition, and alleged that, if she was not the owner at the time of signing the mortgage, she is estopped to deny that she now has legal title thereto.

The trial court entered a decree foreclosing the one-sixth interest in defendant's land. Defendant brings the decree to this court, and sets up as grounds for reversal that the court erred in overruling the motion to dismiss the action of plaintiff at the close of the plaintiff's evidence; that the court erred in not permitting the defendant to testify that Chester Holloway, payee in the note and mortgage, told her just before she signed the note and mortgage that she was signing a lease on the farm where they were then residing, and that the court erred in finding that the note was binding upon the defendant, who was not indebted in any way to the payee, Chester Holloway, and that she signed said note as surety only, without any consideration.

The defendant's counsel made many attempts to introduce statements made by the deceased landlord which induced the defendant to sign the note and mortgage, but upon objections by plaintiff, which were all sustained by the court, the defendant was not allowed to testify to any fact about the signing of the note and mortgage on the objection of the plaintiff that under section 20-1202, Comp. St. 1929, it would be testimony relating to a transaction with the deceased landlord.

Defendant relies upon the case of *Hlavaty v. Blair*, 101

Neb. 414, in which a portion of the text reads as follows: "It is urged that there is no competent evidence of *reliance* upon any statement of deceased. It is said: 'Reliance in this case upon the alleged false statement involved a mental process known to appellee alone.' This comes near being true in any case, and by this argument it might follow that death of one, closing the mouth of both parties to the transaction, would prevent rescission for fraud in all cases. The general test is that such witnesses may testify to matters where the decedent, if alive, could not testify of his personal knowledge to the contrary. Certainly a state of mind, independent of the communication had between the witness and the deceased, is not open to the objection. Such would be testimony that she made no inquiries of other persons touching the character of the land or water rights appurtenant thereto; that, outside of anything Mr. Blair may have said to her, she did not know there were any bonds against the irrigation district where the land was situated; and that she believed any statements made by Mr. Blair to be true."

However, in the instant case we have the undisputed testimony of the banker, who acted as notary public, of what occurred when all three parties were in the small room in his bank. His testimony, in brief, is that he was an entirely independent party, and received no pay from any one for executing the papers; that Mr. Holloway said that if they would give him a note, and also a mortgage on her undivided interest in her land near Hastings, he would let them stay another year; and the next day after these papers were signed he gave them a lease on the farm they were on for another year.

Witness said there were no threats made, and when he asked Mrs. Sheen, who signed the note and mortgage first, if it was her voluntary act and deed, she said, "Yes, sir," and everything seemed agreeable between the parties at the time the papers were executed.

In the instant case, repeated objections were seasonably made to every effort to draw from the defendant fraud-

ulent representations which she alleged in her answer were made by the deceased landlord to secure her signature. Each objection was sustained by the court under section 20-1202, Comp. St. 1929, and we see no error in such rulings. *Wright v. Wilds,* 124 Neb. 11; *Weber v. Crabill,* 123 Neb. 88; *Banking House of F. Folda v. Higgins,* 122 Neb. 279; 12 Neb. Law Bulletin, 282.

The defendant insists that this court has held in *Spelts & Klosterman v. Ward,* 2 Neb. (Unof.) 177, that when one is dealing with an illiterate party it is incumbent upon such party to prove that such illiterate fully understood the object and purport of the writing which was executed. Also, in *Farmers Bank v. Normand,* 3 Neb. (Unof.) 643, the plaintiff has the burden of proving that a married woman intended to bind her separate estate. However, in the case at bar the note itself contained the married woman's clause binding her estate. These two cases are both unofficial in the sense that they only determine the law in the case tried.

We are also cited to *First Nat. Bank v. Ernst,* 117 Neb. 34, holding to the same effect, and it is clear that in this case the note did not contain any clause showing her intention to bind her own estate.

In this case it is clear that they were several years behind with the rent on their farm, and both the husband and wife desired to remain another year. The landlord would not consent to it unless they cleaned up the past-due payments by a note and mortgage on her interest in her Adams county land.

In *Biltwell Tire & Battery Co. v. Book,* 112 Neb. 647, this court held:

"A married woman may bind her separate estate as surety for her husband, and the extension of the time of payment of her husband's past-due indebtedness is a sufficient consideration to support her contract as his surety for such debt.

"A married woman who joins with her husband in the execution of a promissory note which contains a clause by

which she expressly charges her separate estate with the payment of the note is bound by her contract to the same extent as if she were a *feme sole*."

In the case at bar the trial court had the advantage of studying the few witnesses as they testified. His conclusions were dictated into the bill of exceptions and became a part of the record, and a portion thereof reads as follows:

"The evidence in this case, as far as it is competent, tends to show that the defendant in many ways was an illiterate person, but she could write her own name, and was not a person that could not understand an ordinary business transaction; or at least she could understand the ordinary affairs of life and affairs of business when they were explained to her.

"The court finds, first, that she is not so defective in mind that she cannot understand this transaction. The court finds that there is no evidence of fraud shown in this case."

We have carefully examined all of the errors set out for reversal, and find none of them prejudicial, and the decree of the trial court is hereby

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SOUTH OMAHA STATE BANK, APPELLEE: MARYLAND CASUALTY COMPANY, INTERVENER, APPELLANT.

FILED APRIL 11, 1935. No. 29450.

1. **Appeal**: CASE STATED. Under subdivision c of rule 9 of this court a case stated shall in plain language recite the facts upon which the questions of law arise, which shall then constitute the bill of exceptions, and shall, if both parties desire, be advanced for hearing in this court.
2. **Banks and Banking**: CITY DEPOSITS: SURETY BOND. Section 14-547, Comp. St. 1929, being incorporated into the home rule charter of the city of Omaha, requires a bank to give a bond to said city for its deposits, and while it may imply, it

does not specifically require, that the said bank must pay the premium on said bond.

3. ———: ———: INSOLVENCY: PREFERENCES. Public funds of the city of Omaha deposited in a state bank, and protected by a depository bond, the bank paying the premium therefor, become, upon the failure of said bank, deposits "otherwise secured," under section 8-1,102, Comp. St. 1929.

4. ———: ———: ———: SUBROGATION. A bonding company, paying the city in full for such deposits under the terms of its depository bond, and thereupon subrogated to the rights of the city in said deposit, cannot share with preferred depositors, who have no security in the distribution of the assets of the insolvent bank, but are entitled to a general claim therefor.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed.*

Crossman, Munger & Barton, Varro H. Rhodes and *Story & Thomas,* for appellant.

F. C. Radke and *O'Sullivan & Southard, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

PAINE, J.

From a judgment of the district court, classifying the claim of intervener as a general rather than a preferred claim against the assets of an insolvent state bank, intervener has appealed.

This cause has been advanced for hearing, as it is a case stated, under subdivision c of rule 9 of the rules of this court. No facts are in dispute, and only questions of law are involved.

The South Omaha State Bank was closed August 13, 1931, and was adjudicated insolvent, and on August 29, 1931, E. H. Luikart, secretary of the department of trade and commerce, was appointed receiver. Said bank was a duly authorized depository of the city of Omaha, and on December 29, 1930, said city received a depository bond of the Maryland Casualty Company, intervener herein, in the

amount of $25,000. which was duly approved by the city council.

On January 1, 1931, a similar depository bond, in the amount of $55,000, of the Glens Falls Indemnity Company, was also received by said city in behalf of its funds deposited in said bank, and was also in effect when said bank closed, but which bond is not involved in this proceeding. When the bank closed there were deposits of the city of Omaha of $39,249.97 in said bank, the same being public funds. There were no set-offs or counterclaims against said deposits.

The Maryland Casualty Company paid the city on its bond its full *pro rata* share of said deposit, in the sum of $12,265.62, on December 23, 1931. Thereupon, the city council, by proper resolution, authorized the city treasurer to execute and deliver to said casualty company, intervener, an assignment of its right, title, and interest in and to said deposit up to the amount paid by said intervener, and notice thereof was given to the receiver on January 12, 1932.

The receiver classified the claim of the city of Omaha for said deposit as a general claim, payable only after all preferred claims for deposits had been paid, and the district court confirmed said classification. Timely objection was made by the intervener to such classification.

The entire premium on the depository bond was paid by the bank, which did not give the intervener any collateral or security to protect said deposit. The bank had assets on hand at the time it closed in excess of $500,000. It is agreed that no part of the claim belonging to the intervener has been paid by the receiver.

It is further agreed that the city of Omaha, pursuant to sections 2-5, art. XI of the Constitution, did on July 18, 1922, adopt its home rule charter, included in which was that section of the statutes of Nebraska now designated as section 14-547, Comp. St. 1929, and which section thereby became a part of the home rule charter, being section 44, art. IV, therein, and that the same is now in full force and effect.

The intervener is not now claiming consideration on constitutional grounds, as such questions have been eliminated from the consideration of this court.

The city of Omaha complied in every particular with the statute, and the bank has done the same, and has furnished a bond, and the bond was paid for out of the funds of said bank. Under the law, section 14-547, Comp. St. 1929, the city of Omaha could make no deposit in the bank unless such deposit was protected by a bond. It is insisted by appellant that this case is different from other cases we have had involving the same bonds, in that it brings up for our consideration the provisions of the home rule charter of the city of Omaha.

One of the cases involving the law in question was that of *State v. First State Bank*, 122 Neb. 109, in which the city of Alliance had required the First State Bank to put up with it seven Federal Land Bank bonds as security for the deposit of the city in the amount of $14,691.56 on the date that the bank failed. The bonds were sold and applied on this deposit, and there was a balance due the city from the bank of $7,722.62, for which the city of Alliance filed a claim, asking that the same be allowed as a preferred claim, being the amount of its loss on its deposit over the collateral put up as security. Section 8-1,102, Comp. St. 1929, divides depositors into two classes: One who relied upon the bank assets; and, second, another class which can have their deposits "otherwise secured" by requiring the bank to put up a bond or collateral. The city of Alliance should have required security for all of its deposits, but for some reason deposited funds to double the amount of its security; but as a city is in a special class, which has the right to demand and obtain security, and failed to do so, this court held that it was only entitled to file its claim for its loss as a depositor that was "otherwise secured."

The question came to this court again in *State v. First State Bank of Alliance*, 122 Neb. 502, which involved Box Butte county, which had deposits of $28,961.67, secured by

a pledge of Liberty bonds, and among other bonds a depository bond for $8,500 of the National Surety Company, intervener, and such intervener asked to have the amount it had paid on its bond allowed as a preferred depositor's claim and paid in full. It was there held that the bank did not hold such deposits as a trust fund under section 77-2506, Comp. St. 1929, and that such county funds were to be considered as a deposit "otherwise secured," and not entitled to an equality with general depositors.

This question came before this court again in the case of *State v. Bank of Campbell,* 125 Neb. 485, in which two individuals intervened and asked to have time certificates of deposit, drawing 4 per cent. interest, allowed on an equality with other general depositors as preferred claims, even though they had required certain officers of the bank to personally indorse said certificates. As it appeared that no part of the bank's assets was used in procuring such voluntary indorsements, this court held that the deposits of the interveners were not in the class of deposits "otherwise secured," and the certificates of deposit were allowed as preferred claims against the assets of the bank.

In the case of *State v. State Bank of Omaha,* 125 Neb. 492, it appeared that the city of Omaha had on deposit $8,676.09 when the bank failed, and had a depository bond of the New Amsterdam Casualty Company to protect the same, the bank having paid the entire premium upon the bond. The intervener, having paid the amount of the deposit to the city, took an assignment of its claim from the city, and presented it for allowance in full as a preferred claim. In this decision it is pointed out that the bank's assets could not be used or pledged to guarantee the deposits except in the case of public funds, and it was held that the intervener's claim, founded upon the city deposit which it had paid, could not be allowed except as a general claim. It happened in this same case that the same bonding company had given a bond to protect the funds of Douglas county in the same bank at the time of its closing to the amount of $40,000, which it also paid in full, but in

the case of the county deposit, as Douglas county purchased the bond and paid the premium thereon, which did not deplete the assets of the bank in any way, it was held that on the cause of action, based on the deposit of county funds, such funds were not "otherwise secured."

It therefore appears that this court has had before it this same question in several forms, and while the other cases did not involve the home rule charter of the city of Omaha, yet the court has heretofore considered the sections of our statute relating to such bond protecting deposits of public funds, and has passed upon the question of law involved.

It is evident to the court, in spite of the very able argument, that the provisions of the home rule charter do not in any way change the legal situation, and that in the case at bar, the bank having purchased the bond and paid all of the premium thereon, thereby depleting the assets of the bank to that extent, the deposit was "otherwise secured," and cannot be allowed as a preferred claim against the assets of the bank, and cannot be allowed to participate in the distribution of assets on a par with the unsecured depositors in said bank. It can only be allowed as a general claim, and the decree of the trial court in that regard was right, and is hereby

AFFIRMED.

PLATTSMOUTH BRIDGE COMPANY, APPELLEE, V. JOHN E. TURNER, COUNTY TREASURER, ET AL., APPELLEES: SCHOOL DISTRICT NO. 1, CASS COUNTY, APPELLANT.

FILED APRIL 11, 1935. No. 29248.

1. **Schools and School Districts: TAXATION: SITUS OF BRIDGE.** In a suit brought to enjoin the collection of a tax assessed against a toll bridge and alleged to be void because assessed in a school district other than where it is located contrary to section 77-1416, Comp. St. 1929, the situs of the bridge is a fact to be determined from the evidence.

2. **Judgments:** RES JUDICATA. Where the issues and parties in two separate actions are different, a judgment in the first is not *res judicata* as to any fact at issue in the second.
3. **Schools and School Districts:** BOUNDARIES. Where the boundaries of a school district are fixed by a special act of the legislature, a subsequent act of the legislature authorizing the county superintendent to change or modify the boundaries of any school district at any time will have no application to the former where it appears that it was the intention of the legislature that effect should be given to both acts.
4. **Statutes:** CONSTRUCTION. "A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside of the scope of the former." *State v. Clarke*, 98 Neb. 566.

APPEAL from the district court for Cass county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Dwyer & Dwyer and *H. A. Dwyer*, for appellant.

Jesse L. Root, W. G. Kieck and *W. A. Robertson, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

CARTER, J.

This is an injunction action commenced by Plattsmouth Bridge Company, a corporation, against John E. Turner, county treasurer of Cass county, Nebraska, and other officers of the county, and the officers of school district No. 1 of Cass county, Nebraska, praying that they be enjoined from collecting school taxes assessed against the bridge company for the year 1932 for the reason that the bridge company property in question was located in school district No. 2 and not in school district No. 1. District No. 2 intervened in said action and set up its claim that the property was located within its district. From a decree of the district court finding that the property was located in district No. 2, district No. 1 brings this appeal. As a matter of convenience, the Plattsmouth Bridge Com-

pany will be designated as the bridge company, and the two school districts will be designated as districts No. 1 and 2, respectively.

The record discloses that early in 1930 the bridge company completed the construction of a toll bridge over the Missouri river near Plattsmouth, Cass county, Nebraska. In 1931 the west half of the bridge was assessed in district No. 2, and in 1932 it was changed from district No. 2 to district No. 1 after the board of equalization had adjourned and without notice to the parties interested. The evidence is conclusive that the bridge abuts on the fractional north half of the northwest quarter of section 20, township 12 north, range 14 east of the sixth P. M., in Cass county, Nebraska. The question for determination is whether the fractional north half of the northwest quarter of section 20 is within the boundaries of district No. 2, as alleged by appellees, or whether it is within the boundaries of district No. 1, as claimed by the appellant.

The appellees contend that the reported case of *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, determines the issues raised by this appeal and that they are therefore *res judicata*. This contention is without merit. District No. 1, or any party in privity with it, was not a party to that suit. Neither were the issues identical. The reported opinion in that case clearly shows that all parties thereto assumed that fractional section 20 was within district No. 2 and the question determined was whether the railroad bridge was within the boundaries of fractional section 20. The decision of this court that the railroad bridge was not within fractional section 20, and not therefore within district No. 2, is in no way binding upon the appellant in the case at bar. The parties in that case were not the same and the issues altogether different. The doctrine of *res judicata* can under such circumstances have no application. *Andrews v. Commercial Casualty Ins. Co.*, *ante*, p. 496.

The record discloses that the city of Plattsmouth was created a body corporate on March 14, 1855, by a special

act of the legislature of the territory of Nebraska, its boundaries being therein described as "all the territory within the geographical limits of the city of Plattsmouth, together with all additions that may be made thereto." Laws 1855, p. 366, sec. 1. On February 16, 1867, the territorial legislature passed an act authorizing "the common council of the city of Plattsmouth to raise money to erect a central or high school building, and for other purposes." This act also provided "that the mayor and common council of the city of Plattsmouth shall * * * be commissioners of the schoolhouse fund in and for said city * * * and shall possess all the rights, powers and authority, and be subject to the same restraints of township boards of education." Territorial Laws 1867, p. 38, sec. 1. By this special act, the territory within the geographical limits of the city of Plattsmouth, together with all additions that may be made thereto, is designated as a school district. It is argued that this act is in conflict with the provision of the Constitution of 1866 which provides: "The legislature shall pass no special act conferring corporate powers." Const. 1866, art. VIII, sec. 1. This can have no application for the reason that the Constitution commonly called the Constitution of 1866 did not go into effect until March 1, 1867. The Constitution of 1866 did provide, however, that "it shall be the duty of the legislature to pass suitable laws * * * to encourage schools and the means of instruction." Const. 1866, art. I, sec. 16.

On June 24, 1867, an act "for the revision of the school law" was passed which contained the following provision: "That each organized county shall be divided by the county superintendent into as many school districts as may from time to time be found necessary; Provided, That the superintendent shall have power to change or modify the lines or boundaries of any school district at any time." Laws 1867, p. 101, sec. 1. It is the contention of appellant that this section authorized the county superintendent to change the boundaries of district No. 1, which he later attempted to do. The same act, how-

ever, contained this provision: "Nothing in this act shall be construed, so as to interfere with, or abrogate any of the rights, privileges, and immunities, duties or liabilities conferred or prescribed, by special enactment, for any school district comprised within any incorporated city." Laws 1867, p. 110, sec. 60. The provisions just quoted from the school law of 1867 were continued in force and in substance reenacted in the act of February 18, 1873, entitled an act "to regulate the public schools of Plattsmouth City, and provide means for their support." Laws 1873, p. 73. This subsequent act at least indicates a legislative intent to preserve the rights of school districts organized by special enactment. It is argued that the Constitution of 1866 deprived the school district of Plattsmouth City of any rights that it may have had prior to the date that it became effective. The Constitution itself preserved existing rights by providing: "That no inconvenience may arise from the change of territorial government to a state government, it is declared that * * * all laws now in force shall remain in force until altered, amended, or repealed by the legislature: Provided, Wherever the word territory shall occur, it shall be construed to mean state, whenever it may be necessary, in order that such laws may conform to the state government." Const. 1866, art. XI, sec. 1.

The question therefore is whether the act of June 24, 1867, providing that the superintendent shall have power to change or modify the boundaries at any time can affect the school district of Plattsmouth City and whether the county superintendent had the power after the passage of that act to change the boundaries of the school district in Plattsmouth City. The only reasonable construction that can be placed on this legislation is that the act of June 24, 1867, providing that the county superintendent could change or modify the boundaries of any district at any time, and all subsequent general acts of like nature, could have no effect upon a district organized by special enactment as was the Plattsmouth school district.

The act of the legislature in making the territory within the city of Plattsmouth and its additions a school district was special in its nature. All of its rights and liabilities were reserved to it that were not expressly taken away. We can find no legislative act that specifically nullifies the act of the legislature in fixing the boundaries of Plattsmouth school district. The act of June 24, 1867, authorizing county superintendents to change or modify school district boundaries can have effect only when the special legislative enactment is without force. This court has held: "A particular intention expressed in a legislative act, if in conflict with a general intention expressed in a later enactment, should be given effect, leaving the later act to operate only outside of the scope of the former." *State v. Clarke,* 98 Neb. 566. Also, in the case of *Jackson v. Washington County,* 34 Neb. 680, it was held: "It is an established rule of construction that a subsequent statute treating of a subject in general terms and not expressly contradicting the provisions of a prior act, shall not be construed as intended to affect the more particular and positive provisions of a prior act, if any other reasonable construction can be adopted."

It might be argued that the subsequent statute, providing that the county superintendent shall have power to change or modify the boundaries of any school district at any time, is in direct conflict with the act of February 16, 1867, which provides that the city of Plattsmouth shall be a school district by itself. But, in view of the reservations made in the act itself preserving to it all the rights, privileges, immunities, duties or liabilities conferred by special enactment, it was clearly the intention of the legislature that effect should be given to both statutes. The subsequent action of the legislature in reenacting this provision in 1873 further supports the theory that it was intended that both acts should be given effect.

This being true, district No. 1 consists of the territory within the geographical limits of the city of Plattsmouth,

together with all additions that may be made thereto. The order of the county superintendent under date of April 20, 1869, stating that "school district No. one (1) embraces the city of Plattsmouth and its additions," correctly designates the boundaries of that district according to the record before us. The subsequent orders of the county superintendent, under the dates of May 18, 1870, December 15, 1870, and November 1, 1871, purporting to transfer fractional section 20, or any part thereof, from district No. 2 to district No. 1 are void and without effect. It necessarily follows that the fractional north half of the northwest quarter of section 20, hereinbefore fully described, and the toll bridge located thereon, are within the boundaries of district No. 2.

The contention is made by the appellant that, the land on which the bridge is located having been assessed in district No. 1 for a long period of time, and the taxes having been paid without objection, appellees are now estopped to deny that it is within the district. In the case at bar, the tax levied by district No. 1 is void for the reason that it is not within the district. Its situs for taxation purposes is by statute the same as the real estate on which it is located. Comp. St. 1929, sec. 77-1416. It being determined that the real estate is in district No. 2, it necessarily follows that the situs of the bridge thereon is also in district No. 2. A void tax is no tax. It can be enjoined or collaterally attacked. The fact that previous owners of the real estate, on which the bridge is located, labored under a mistake of fact as to which school district it was in and paid their taxes in the wrong district, no prejudice to the district being shown, cannot change the result. In the case of *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369, it was held: "All that appears is that the tax agent so listed the property as being in school district No. 2; that he did this because of a mistake of fact as to the actual location of the bridge and that the mistake was innocently made; but it does not appear that the school district was in any manner

prejudiced by such listing or representation of the railroad company's tax agent, and we conclude, therefore, that the conduct of the railroad company in listing its property as being in school district No. 2 in the year 1895, and prior years, does not estop it from maintaining this action." The bridge company and its predecessors in interest are in the same position as the railroad company in the case cited, and, for the reasons set out in that decision, we hold that there is no estoppel in the case at bar.

The trial court arrived at a proper conclusion and the decree entered below is in all respects correct. The judgment of the trial court is therefore

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, APPELLEE, V. MITCHELL IRRIGATION DISTRICT, APPELLANT: FARMERS IRRIGATION DISTRICT, INTERVENER, APPELLEE.

FILED APRIL 13, 1935. No. 29522.

APPEAL from the district court for Scotts Bluff county: LOUIS LIGHTNER, JUDGE. *Supersedeas allowed.*

Morrow & Morrow and *James A. Greenwood,* for appellant.

William H. Wright, Attorney General, C. G. Perry and *Neighbors & Coulter, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

PER CURIAM.

This matter arises on the application of the appellant for an order permitting the decree of the district court to be superseded by the giving of bond. Appellant further asks this court to fix the terms and conditions of the bond if allowed.

The record in this case discloses that the state of Nebraska brought this suit for the purpose of determining the rights and powers of the state of Nebraska, through its department of roads and irrigation, bureau of irrigation, water-power and drainage, over the Mitchell Irrigation District. The Farmers Irrigation District intervened in said suit by leave of court claiming, in part, that its appropriation of September 16, 1887, was prior to that of the Mitchell Irrigation District and praying for an adjudication to that effect. The Mitchell Irrigation District has no appropriation in Nebraska, but claims an appropriation under the laws of Wyoming under date of June 20, 1890, which said Wyoming appropriation has been recognized by the department of roads and irrigation, bureau of irrigation, water-power and drainage of the state of Nebraska, pending litigation to definitely determine the same.

The trial court, upon a trial of the case, entered two decrees, one determining the issues between the state of Nebraska and the Mitchell Irrigation District, and the other determining the issues between the intervener, Farmers Irrigation District, and the Mitchell Irrigation District.

We are of the opinion that the Mitchell Irrigation District is entitled to supersede the decree of the trial court which adjudicates the issues raised between it and the Farmers Irrigation District. There is no reason that has been brought to our attention why a bond will not protect the Farmers Irrigation District for any damages that may accrue because of this appeal if it should be affirmed on final hearing.

On the other hand, the trial court, in entering a decree involving the issues raised between the state of Nebraska and the Mitchell Irrigation District, required certain affirmative acts to be taken by the Mitchell Irrigation District before it could take any water from the North Platte river. Whether or not the Mitchell Irrigation District must comply with these conditions precedent is one of the questions involved in this appeal. If this part

of the decree is not superseded, the district will obtain no water for the 1935 irrigation season or the litigation will be fruitless in this respect.

If, however, we permit the whole of the decree between the state of Nebraska and the Mitchell Irrigation District to be superseded, it will be impossible to have an orderly distribution of water from the North Platte river pending the appeal in this case. We are not therefore permitting that part of the decree of the trial court to be superseded that places the control of the waters of the North Platte river within the jurisdiction of the department of roads and irrigation, bureau of irrigation, water-power and drainage. Under these provisions of the decree which are not to be superseded, the department of roads and irrigation, bureau of irrigation, water-power and drainage, will have full control of the distribution of the waters of the North Platte river in so far as the parties to this action are concerned pending this appeal. The Farmers Irrigation District, under the order of the trial court that is not superseded, will be required, pending this appeal, to respect the rights of all appropriators having appropriations dated prior to September 16, 1887, and likewise the Mitchell Irrigation District will be required pending this appeal to respect the rights of all appropriators having appropriations dated prior to June 20, 1890, including the appropriation of the Farmers Irrigation District.

An order permitting the Mitchell Irrigation District to supersede the decrees of the district court in accordance with this opinion will therefore be allowed. The amount, terms and conditions of the supersedeas bond will be set forth in the formal order filed herein.

SUPERSEDEAS ALLOWED.

PETER VONBURG ET AL., APPELLANTS, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED APRIL 18, 1935. No. 29385.

1. Waters: APPROPRIATION FOR IRRIGATION. Where, in 1887, certain landowners organized a corporation to construct a canal to irrigate their own lands, obtained the right to appropriate water from a river for irrigating purposes, constructed a canal 10 miles long, took the water under their right of appropriation, conducted it through the canal to and irrigated their lands, they thereby obtained a vested right to the use of the water to the extent of their appropriation and application of it to the irrigation of their lands.
2. ———: ———: SALE OF RIGHTS: RESERVATIONS. Under such circumstances, the owners of such canal, under the law as it existed in 1890, could sell and convey the same, reserving to themselves, by contract with their vendee, the perpetual use of such water right, and could lawfully contract that they should not be required to share or prorate the water with subsequent patrons of the canal company.
3. ———: ———. Section 13, art. II, ch. 68, Laws 1889, does not require the owners of a prior vested water right, in time of water scarcity, to prorate the water with users whose rights are subsequently obtained.

APPEAL from the district court for Scotts Bluff county: RALPH R. HORTH, JUDGE. *Reversed.*

Morrow & Morrow, for appellants.

Neighbors & Coulter, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

This is an action for injunction and other equitable relief. The trial court sustained a general demurrer to the petition. Plaintiffs refused to further plead, and the action was dismissed. Plaintiffs have appealed.

The following is a brief summary of the pertinent facts alleged in the petition: Each of the plaintiffs is the owner of land that has been regularly irrigated for more than

40 years from water furnished through a canal which is now owned by the defendant corporation. Plaintiffs claim the right to a continuation of this service under and pursuant to a prior appropriation of the water and to contracts entered into between them and the Farmers Canal Company, a former owner of the canal, and without being compelled to prorate the water in the canal with other patrons of the defendant corporation. The individual defendants are the manager and officers of the defendant corporation.

In 1887 a number of farmers organized a corporation, known as the Farmers Canal Company, for the purpose of constructing a canal for irrigation and other useful purposes. They took the proper steps to appropriate water from the North Platte river. The appropriation was for a sufficient quantity of water to fill a canal 40 feet wide on the bottom and 4 feet in depth. Between that year and 1890 the canal company constructed a canal about 10 miles in length. No stock in the corporation was actually issued. The work of constructing the canal was done by the farmers who organized the company, and each was entitled to stock in the corporation to the amount of labor or material furnished by him. In the year 1890 the owners of the canal company were irrigating their lands with the water through the canal. In the fall of 1890 the canal company entered into an arrangement with one Wright and others, whereby the then owners arranged to transfer to Wright and his associates the corporate franchise and canal, but were to retain the exclusive, perpetual right to the use of sufficient water from the canal to irrigate the lands then irrigated and owned by the original incorporators or stockholders of the canal company. In January, 1891, the contracts between the canal company and its former owners were entered into and were exactly alike, with the exception of the name of the landowner and the amount of water for irrigation purposes to which each would be entitled. The plaintiffs are either the owners of such contracts, or successors in

interest to such owners. The contracts in question were executed as a part consideration for the transfer of the rights of the then owners of the canal company to Wright and his associates. Wright and his associates took over and became the owners of the Farmers Canal Company, subject to the several contract rights of the former owners. Subsequently, by mesne conveyances, the Tri-State Land Company and the defendant corporation, in turn, became the owners of the canal, each taking with full knowledge of and subject to whatever rights the first owners had, pursuant to their several contracts.

In each of the contracts the canal company agreed, for itself and its successors, "to deliver the water at such points along the line of said canal, at headgates erected and provided by the second party, his heirs, and assigns, in such amount at each headgate as may be directed by the party of the second part. The aggregate of said water not to exceed the amount hereinabove stated," being the amount provided for in each contract. The method of measuring the water was provided for. Other provisions of the contract are as follows:

"And for the better security of the second party (the former stockholder) for the faithful fulfilment and performance of the covenants and agreements upon the party of the first part, its successors and assigns forever, hereinabove covenanted and agreed by the said first party upon its part to be kept and performed, the said first party does hereby waive all right to prorate the water in said canal. And the said second party, his heirs and assigns forever, shall be supplied with water first in preference over any and all subsequent stockholders in the said canal. And it is further specially agreed that this perpetual water right, as above set forth, shall be forever free from any and all assessments or taxes of any nature or for any purpose whatsoever.

"Said first party agrees to deliver the water as above set forth, at the headgates erected and provided by the second party for a distance not to exceed 40 miles along

said canal from the point where the first party diverts the water, for the supply of said canal, from the North Platte river, viz.: at a point in section ten, township twenty-three, range fifty-eight, west of the 6th P. M. where the principal headgate is now located and established."

November 17, 1890, the canal company, at the headgate of its canal, posted notice of its intention to appropriate and claim the use of water from the North Platte river, in addition to its former claim, to the amount of 200,000 miners' or statutory inches for irrigation and other useful purposes. Such notice specified that the canal would be 80 feet wide on the bottom, with a slope of one to one and a depth of 8.84 feet at the point of diversion. Later, on application to the state board of irrigation, the claim of the canal company was adjudicated to be a valid appropriation of water to the extent of 1142 and 6/7 cubic feet per second and dating from September 16, 1887.

The effect of this adjudication by the state board of irrigation was before this court in *Farmers Canal Co. v. Frank*, 72 Neb. 136, wherein it was said (p. 154): "Though the board in adjudicating the claim of the Farmers Canal Company, in all probability, acted erroneously, and made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, still, it had jurisdiction to hear and determine, and no appeal having been taken from its determination, its order allowing the appropriation is final and cannot be attacked collaterally." We are of the opinion that, while the right of the canal company to its appropriation to the extent of 1142 and 6/7 cubic feet per second is valid under that adjudication, it cannot affect the contractual rights of plaintiffs previously acquired.

During the time that the Tri-State Land Company owned the canal it denied the right of the contract holders to receive water without paying therefor. Litigation arose which was finally determined by this court in *Fenton v.*

Tri-State Land Co., 89 Neb. 479. It was therein held that the contracts were valid and enforceable as respects the right to receive water without making any payment therefor. The court, however, did not pass upon the question as to whether the provision for nonproration of water was enforceable, since up to that time no question had been raised as to the insufficiency of water to supply the needs of all patrons of the Tri-State Land Company. Thereafter, water was furnished to the owners and holders of the contracts as before until the year 1934, when there was a scarcity of water and not a sufficient supply from the natural waters of the river to furnish the required amount for all of the patrons of the defendant corporation. The defendant corporation and its officers then refused to furnish to the contract holders other than a *pro rata* share of the water carried in the canal from the natural waters of the stream.

The defendant corporation has acquired the right to obtain storage water which it also carries in the canal; but plaintiffs in their petition assert no right to any portion of the storage water carried in the canal, but only to the water for which their contracts call, provided that the natural flow of water in the North Platte river at the headgate is sufficient to furnish them that quantity.

We are of the opinion that the present controversy hinges on the question of whether plaintiffs, by their contracts and under the law as then existing, acquired a vested right to the quantity of water for which their contracts call.

It is true that the original organization of the Farmers Canal Company contemplated a longer canal than 10 miles and the application of water to other lands, but the incorporators had constructed the canal but 10 miles in length, and it was optional with the then owners whether they would ever extend it beyond its present limits. They had the undoubted right to carry the irrigation project no farther. At the time of the transfer

of their property and franchise to Wright, they had the undoubted right to the use of water for irrigating purposes to the extent that they were then using it upon their lands. They could not be required to extend the canal or to give any other person the right to use the water from the canal at that time. We think that to a prospective purchaser of the canal, who might desire to purchase for the purpose of extending the canal, under the law as then existing, they could say: "We will sell you the canal and our franchise upon the condition that our appropriation and use of the water will be continued without our being compelled to prorate, in time of scarcity, with other patrons whom you may procure by extension of the canal." This they did. In the transfer to Wright and his associates, and under the contracts then executed, plaintiffs and their assignors were expressly given such right.

In *Fenton v. Tri-State Land Co., supra,* it was held: "Where, in 1891, certain owners of an irrigation canal which was in operation for a distance of about ten miles conveyed the same, reserving to themselves a perpetual right to water under a common agreement, the court will apply the provisions of chapter 68, Laws 1889, and hold their rights equal as to each other, but superior to those of consumers under a new section of canal beginning at the end of the ten miles already in operation." In the opinion the court called attention to sections 12 and 13, art. II, ch. 68, Laws 1889, in force when the contracts were made. After quoting these sections the court said: "Under these provisions it is plain that the rights of the original stockholders must be held to be a common right by virtue of their own previous custom and agreement, and that their priority, in the absence of any such agreement, would have been in the order of their location along the line of the canal. We must consider the contract holders equal in priority as against subsequent consumers, whose lands lie beyond the ten miles of the original ditch, but perhaps subject to the statutory requirement that

in time of scarcity the water shall be equally distributed. This, however, has not been argued and it is unnecessary to determine."

Defendants contend that, under the provisions of section 13, art. II, ch. 68, Laws 1889, which was in force at the time the contracts were entered into, plaintiffs are compelled to prorate waters with subsequent patrons of the defendant corporation. Said section reads:

"In case any person, company or corporation has constructed a ditch for the purpose of diverting the water of any river, creek, canyon, ravine or spring, for the purpose of selling the water thereof for irrigating purposes, the owners or cultivators of said land along the line of and covered by said ditch or canal, are entitled to and have the right to the use of water from said ditch or canal, for the purpose of irrigating said land, so owned or cultivated in the following order:

"First. All persons through whose land such ditch or canal runs are entitled to the use of the waters thereof in the order of their location along the line of said ditch or canal.

"Second. After those through whose land the ditch or canal runs, those upon either side of the line of the ditch or canal are entitled to the use of the waters thereof, those equally distant from the line of said ditch or canal are entitled to priority in the order of their location along the line of said ditch or canal; *Provided,* That in times of scarcity of water the same shall be equally distributed to the consumers thereof."

From a careful examination of the quoted section, we are of opinion that it does not sustain defendants' contention. It provides for different classes, with priority rights vesting in each class. Those in each of the classes possess equal rights, but each of the classes is assigned priority in their order. We think the proviso above quoted must be regarded as relating to the several classes. It was not intended to destroy the priorities established by the law or previously vested rights. The provision for

proration was not intended to affect a prior vested right. In our opinion, the original owners of the canal were in a class by themselves, and all in that class are entitled to the same priority. They conveyed their franchise and the canal to others, with the distinct reservation in themselves of rights which they then possessed. The vendee could not complain, and all those patrons of the vendee or its successors had knowledge of the rights of the plaintiffs, and that their contract or arrangement with the defendant corporation for the use of water was subject to the rights of the plaintiffs. The holding of this court in *Fenton v. Tri-State Land Co., supra,* wherein it was held that "the court will apply the provisions of chapter 68, Laws 1889, and hold their rights equal as to each other, but superior to those of consumers under a new section of canal beginning at the end of the ten miles already in operation," fixes and determines that the rights of the plaintiffs are superior to the subsequent rights of the patrons of the defendant corporation. It follows that, if their rights are superior, then they are entitled to the water in preference to the subsequently acquired patrons of the defendant corporation.

We are of the opinion that, plaintiffs being all of the persons entitled to use of the water at the time they transferred their franchise and canal to Wright and others and entered into contracts preserving to themselves priority to use of the water, their rights became vested as to such use of the water. It follows that the district court erred in sustaining the demurrer to plaintiffs' petition.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

REVERSED.

THURSTON COUNTY, APPELLANT, V. ED FARLEY, APPELLEE.

FILED APRIL 19, 1935. No. 29260.

1. **Limitation of Actions: PLEADING: AMENDMENT.** It is not permissible for a plaintiff to amend a cause of action barred by the statute of limitations by introducing, in substitution for the other, another and a different cause not so barred.
2. ———. In a civil action for the recovery of fees withheld by a clerk of the district court, the statute of limitations is four years. Comp. St. 1929, sec. 20-212. In an action on the official bond of such an officer, the statute is ten years. Comp. St. 1929, sec. 20-209.
3. **Pleading: DEMURRER.** "A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader." *American Water-Works Co. v. State*, 46 Neb. 194.

APPEAL from the district court for Thurston county: MARK J. RYAN, JUDGE. *Affirmed.*

Robert G. Fuhrman, for appellant.

McCarthy & McCarthy and *Cecil Boughn, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOSS, C. J.

July 30, 1931, plaintiff filed its petition against defendant to recover fees in excess of his statutory salary for 1920 to 1924, earned by defendant as clerk of the district court and unaccounted for to the total amount of $2,732.40. One paragraph of the petition contained a schedule in which appeared, opposite each of the five years above named, the fees earned by the office, the amount paid over to the county treasurer and the balance due the county.

On August 31, 1931, defendant moved the court to require plaintiff to amend its petition so as to set out separately the items making up the aggregate of each

amount set out opposite each respective year. On March 1, 1933, the court sustained the motion, but the order provided that plaintiff might file a certain report of an auditor, covering the accounts of defendant as clerk of the district court. The order further provided that defendant should "plead unto plaintiff's petition within thirty days after the filing of said audit reports or the filing of an amended petition, if plaintiff be so advised."

March 20, 1933, plaintiff filed an amended petition in which it pleaded two surety bonds given by defendant in qualifying for the office of clerk of the district court. One bond was alleged to be in effect for 1919 and 1920 and the other (for a term extended to four years) for the years 1921 to 1925.

March 28, 1933, defendant moved to strike the allegations of the amended petition bringing the surety bonds into the action because such amendments were not permissible under the order allowing the petition to be amended and for the further reason that such amendments substantially changed plaintiff's cause of action.

March 9, 1934, an order was entered sustaining the motion and striking from the amended petition the plea as to the bonds. On the same day an order was entered giving defendant leave to file demurrer instanter. This was done and the court sustained the demurrer. Plaintiff electing to stand upon its amended petition and declining to plead further, the court dismissed the amended petition and plaintiff appealed.

Plaintiff preserved its exceptions to all rulings and assigns as error that the court erred in striking the portion of the amended petition and erred in sustaining the demurrer to what was left in the original petition, and in dismissing the action.

Under the original petition, or under the amended petition as it stood after the court struck from it the plea as to the bonds, the statute of limitations is four years after the accrual of the cause of action. Comp. St. 1929, sec. 20-212. If the surety bonds were the basis of the

action, then the statute is ten years. Comp. St. 1929, sec. 20-209.

The real controversy here is whether the action is barred by the statute of limitations. That in turn goes back to the question whether the amendment of the petition, to plead the official bonds of the clerk of the district court, stated a new and different cause of action from that stated in the original petition.

In *Emel v. Standard Oil Co.*, 117 Neb. 418, the original petition alleged that defendant's driver was in the habit of inviting Emel, an infant, to ride upon defendant's truck; that he invited him on this occasion, and Emel fell from the truck to the ground and was killed. The amendment charged that the driver invited the boy to ride, as was his custom, and, when the child was about to take hold of the truck to mount it, the driver swerved the truck so that the child "missed his hold on said truck and his footing thereon," fell and was killed. It was held that the amendment introduced a new cause of action and its allowance was erroneous.

In *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255, it was held: "A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged."

The amended petition in the case under consideration was based upon bonds given by defendant and the Lion Bonding & Surety Company to assure his official fidelity. When plaintiff amended its petition to set out these bonds, there arose the question of necessity of making the bonding company a party. But plaintiff avoided this by alleging that "the surety on said bond, Lion Bonding & Surety Company, has long since been insolvent and has been liquidated in receivership, and plaintiff is without any legal remedy against said surety." Nevertheless, this amendment recited a new cause of action, the purpose of

plaintiff in retaining which was thus to provide a ten-year statute of limitations, instead of the four year statute allowed under the cause of action originally pleaded. The court did not err in striking the allegations as to the bonds from the amended petition.

With the above matter stricken from the petition, what remained was subject to the demurrer of defendant. "A demurrer admits allegations only of fact. It does not admit conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading." 6 Standard Ency. of Procedure, 949, citing *Moriarty v. Cochran*, 75 Neb. 835; *State v. Porter*, 69 Neb. 203; *Markey v. School District*, 58 Neb. 479; *State v. Ramsey*, 50 Neb. 166; *American Water-Works Co. v. State*, 46 Neb. 194.

The statute of limitations had run against the cause of action originally pleaded against defendant. The amended petition undertook to set up another and different cause which was not permissible. The judgment of the district court is

AFFIRMED.

GEORGE H. SINNER V. STATE OF NEBRASKA.

FILED APRIL 19, 1935. No. 29329.

1. **Criminal Law: TRANSCRIPT.** The proper method of incorporating a journal entry into a transcript in proceedings in error from the county court to the district court is to have the journal entry first entered in the county court and then included in the transcript or in a supplemental transcript.
2. **Fines.** "The term 'fine' has a distinct meaning; it is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." 25 C. J. 1148.
3. **Criminal Law: TRIAL: REVIEW.** The accused having been convicted of the violation of a statute in a criminal cause tried before a county judge, the district court has power to review on error proceedings. Comp. St. 1929, sec. 29-617. Upon hearing of a petition in error, the district court is

authorized to reverse the judgment in whole or in part. Comp. St. 1929, sec. 29-621.

4. ———: ———: ———. A defendant charged with a violation of section 28-711, Comp. St. 1929, and convicted, was tried in the county court and "found guilty and fined 60 days in county jail and ordered to pay costs." *Held*, that the sentence was anomalous, ambiguous and inaccurate, and the district court, on proceedings in error, should have reversed the judgment, with directions to the county court to resentence the defendant.

ERROR to the district court for Clay county: FRANK J. MUNDAY, JUDGE. *Reversed, with directions.*

C. L. Stewart and *Waring & Waring*, for plaintiff in error.

William H. Wright, Attorney General, and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

GOSS, C. J.

A transcript of proceedings had in the county court, being part of the record here, shows that on February 15, 1934, a complaint was filed in the county court charging that on or about October 7, 1932, George H. Sinner wilfully and maliciously defaced, mutilated, destroyed and abstracted a part of a police judge docket, property of the city of Sutton. By section 28-711, Comp. St. 1929, such act is a misdemeanor, punishable by fine not exceeding $300 or by imprisonment in the county jail not exceeding three months, or both. The transcript shows that on February 26, 1934, defendant was tried, was "found guilty and fined 60 days in county jail and ordered to pay costs. Notice of appeal was given in open court and bond fixed in the sum of $300." The appeal bond was given and on the same day was approved by the county judge.

It appears from the evidence in the instant case that on March 13, 1934, the appeal was dismissed in the district court because the appeal bond was defective.

Then on March 21, 1934, Sinner gave bond and began proceedings in error in the district court. May 22, 1934, the cause was tried in the district court and the petition in error was denied. After the overruling of a motion for new trial, proceedings in error were brought to this court.

Several witnesses testified they were present when the defendant was sentenced by the county court and that the sentence orally announced by the court was that defendant was fined 60 days in the county jail and ordered to pay the costs.

The county judge was a witness in the district court. He produced in evidence a journal entry covering the hearing and sentence. It recited that "defendant was found guilty and sentenced to 60 days in county jail and ordered to pay costs." But the witness testified that the entry did not appear among the original files delivered to the clerk of the district court. This entry did not appear in the transcript filed in the district court. No supplemental transcript was ever filed in the district court. It does not appear that this new journal entry was ever entered upon the records in the county court. Indeed, the testimony of the county judge is hazy as to when the entry was drawn and signed by him. The nearest he comes to identifying the time when the entry was drawn, or at most placed in the files, was after the appeal came back from the district court. The page of the docket where all entries in the cause appeared do not show any such entry and the transcript of the proceedings (which do not contain any such entry) was duly certified by the county judge in these error proceedings. There are indications in his testimony that lead to the probable inference that the witness never knew the point on which the proceedings in error were based and therefore did not make the journal entry until after the error proceedings were instituted in the district court. Be that as it may, it was not of record in the county court and cannot be considered as a journal entry duly made, correcting or otherwise

modifying the sentence originally entered, and entitled to be relied upon both by defendant and by the state. We must accept the transcript as importing verity and to the effect that defendant was fined 60 days in the county jail.

Can one properly be said to be fined by punishment in jail? Webster's New International Dictionary defines a fine as "A certain payment of money imposed as punishment for an offense."

"The term 'fine' has a distinct meaning; it is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." 25 C. J. 1148, citing many cases defining the word as involving pecuniary qualities. The statute, which defendant was charged with violating, providing both fine and imprisonment in jail as its penalties. The court was authorized to "fine" him in any sum up to $300 or imprison him not exceeding three months. It was certainly, at the least, anomalous to "fine" defendant 60 days in the county jail. It was ambiguous and inaccurate. Did the sentence contemplate that defendant was fined $180, to lay out which would require defendant to be imprisoned 60 days under the provisions of section 29-2412, Comp. St. 1929?

The punishment or sentence imposed by the court in a criminal case should be stated with sufficient certainty to enable the officer to execute it. 8 R. C. L. 230, sec. 226. Because of the uncertainty and ambiguity of the sentence, we are of the opinion it was erroneous, but that it was not void. It was challenged in time that it may be corrected without injustice either to defendant or to society, represented here by the sovereign state.

The accused having been convicted of the violation of a statute in a criminal cause tried before a county judge, the district court had power to review on error proceedings. Comp. St. 1929, sec. 29-617. Upon hearing of a petition in error, the district court was authorized to reverse the judgment in whole or in part. Comp. St. 1929, sec. 29-621.

Upon development of the facts we have outlined, we think the district court erred in not reversing the cause and sending it back to the county court so as to give the county court an opportunity to resentence the defendant by pronouncing and recording a sentence in accord with the statute under which defendant was tried.

Minor propositions are raised in appellant's assignment of errors and brief, but it is unnecessary to consider them in view of the position we have already taken. The judgment of the district court is reversed, with directions to remand the cause to the county court with instructions to resentence defendant.

REVERSED.

SECURITIES INVESTMENT CORPORATION, APPELLANT, V. M. A. KREJCI, APPELLEE.

FILED APRIL 19, 1935. No. 29211.

1. **Replevin:** JUDGMENT. Substantial damages for detention of replevied property and for breach of warranty in the sale of it are not recoverable by defendant from plaintiff, where nominal damages only for such detention are proved; warrantor not being a party to the action of replevin and the evidence being insufficient to show liability of plaintiff on the warranty.
2. ———: ———. Where property has been taken under a writ of replevin and delivered to plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative for the return of the property or for its value, or for the value of defendant's possession, if it cannot be returned, and for damages for illegal detention.
3. ———: ———. The statutory provision for an alternative judgment in an action of replevin, where the verdict is in favor of defendant, is mandatory.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

Francis P. Matthews and *William P. Kelley,* for appellant.

Dwyer & Dwyer, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

ROSE, J.

The action is replevin for a second-hand automobile truck under a claim of special ownership by virtue of a chattel mortgage.

M. A. Krejci, defendant, bought the truck from the Motor Exchange & Refinance Company of Omaha November 25, 1932, and to secure a portion of the purchase price executed later the same day a note and a chattel mortgage on the truck for $319.60, payable to the seller in eight monthly instalments of $39.95 each, beginning December 26, 1932. The note and mortgage were assigned to Securities Investment Corporation, plaintiff, November 30, 1932. The instalment of $39.95 due January 26, 1932, and subsequent instalments were never paid. Plaintiff pleaded right of immediate possession by reason of the default and seized the truck under the writ of replevin.

The answer to the petition contained a general denial, and also a cross-petition alleging in substance that defendant negotiated with the Motor Exchange & Refinance Company for the truck for the purpose of operating it in a freight line between Omaha and Des Moines and extending to other places, under the representation that the truck was ready for such work and fit to go on the road; that defendant made an initial payment of $300; that the truck was in a bad state of repair and defendant was unable to operate it in her freight line; that she had patrons from whom she was realizing a weekly net profit of $125 to $150; that, by reason of false representations and breach of warranty on the part of plaintiff's assignor and unfitness of the truck for freight services, she lost her patrons and the business of other shippers and was damaged in the sum of $1,000 in addition to the 300-dollar payment, or $1,300 in all.

To the cross-petition of defendant there was a reply

containing a general denial and a plea that the Motor Exchange & Refinance Company which sold the truck to defendant and assigned the note and chattel mortgage to plaintiff did not make any false, fraudulent or misleading representations in connection with the sale of the truck.

Upon a trial the jury by their verdict found that defendant was entitled to possession of the truck, when the action was commenced, and to $700 for illegal detention thereof. From a judgment in favor of defendant plaintiff appealed.

In different forms, assignments of error challenge the sufficiency of the evidence to sustain the verdict and judgment. Under the writ of replevin plaintiff procured and afterward retained possession of the truck. Defendant herself adduced evidence tending to prove that the truck, after repeated trials and repairs, could not be used by her for the transportation of freight in her line of business. Plaintiff's detention of the useless truck, therefore, did not damage defendant in the sum of $700 as specifically found by the jury and adjudged by the district court. Defendant argues nevertheless that the evidence shows she lost profits of more than $700 as a result of the false representations inducing the purchase and of the breach of warranty. This position is untenable for the following reasons: The Motor Exchange & Refinance Company that sold the truck to defendant and assigned the note and chattel mortgage to the Securities Investment Corporation, plaintiff, is not a party to the action. The evidence fails to prove that the two companies were the same entity under different names or that plaintiff assumed the obligations of its assignor or became liable to defendant for the former's false representations and breach of warranty. While plaintiff, the assignee, admitted at the trial that it was not a purchaser or holder of the note in due course of business, the admission did not create a liability of plaintiff to defendant for breach of warranty or for torts of assignor; the latter being the seller of the truck, but not a party to the action. The evidence fails to prove

that any litigant was liable to defendant for a breach of warranty or for false representations. There is therefore no foundation in the evidence for the judgment in favor of defendant and against plaintiff for damages in the sum of $700 or more than nominal damages. Moreover, the judgment shows on its face that it does not conform to law. The district court adjudged:

"That the defendant be and is awarded the possession of truck in question and that she have and recover of the plaintiff the sum of $700 as damages for the illegal detention of said truck."

Where property has been taken under a writ of replevin and delivered to plaintiff and the verdict is in favor of defendant, the judgment must be in the alternative for the return of the property or for its value, or for the value of defendant's possession, if it cannot be returned. The law has been stated as follows:

"The statute is imperative, that where the property has been delivered to the plaintiff in replevin, in case a verdict is returned for the defendant, the judgment must be for the return of the property, or its value in case it cannot be returned, or the value of the defendant's possession." *Manker v. Sine,* 35 Neb. 746. See Comp. St. 1929, sec. 20-10,104. See, also, *Field v. Lumbard,* 53 Neb. 397.

Finding the record in the anomalous condition outlined, the judgment is reversed for the reasons stated and the cause remanded for further proceedings.

REVERSED.

MERTIE M. ARNOLD, APPELLEE, V. MARY IRENE HAWLEY ET AL., APPELLANTS.

FILED APRIL 19, 1935. No. 29244.

1. **Mortgages:** DEFICIENCY JUDGMENTS. Section 20-2141, Comp. St. Supp. 1933, repealing previous statute permitting recovery of deficiency judgment in action for foreclosure of mortgage on realty, does not affect actions then pending.

2. ———: FORECLOSURE: DEFICIENCY JUDGMENTS: DEFENSES. "A decree of foreclosure of a real estate mortgage showing personal liability of defendant for any deficiency that may remain after sale of the mortgaged premises precludes such defendant on an application for a deficiency judgment from presenting any defense which he could or should have interposed prior to the announcement of the decree." *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385.
3. ———: ———: ———. "Where facts showing defendant's liability for a deficiency are set out in the petition to foreclose, and judgment for a deficiency against those personally liable for the debt is prayed, the court has jurisdiction, after a sale of the mortgaged premises, to enter a deficiency against the defendants so found liable on a motion therefor by the plaintiff." *Patrick v. National Bank of Commerce*, 63 Neb. 200.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

E. H. Evans and *Urban Simon*, for appellants.

Hoagland, Carr & Hoagland, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

GOOD, J.

In a mortgage foreclosure action, after decree, expiration of stay, sale of the mortgaged premises and confirmation thereof, a deficiency judgment was entered against the defendants. From the entry of the latter judgment, defendants have appealed.

Defendants contend that the trial court was without jurisdiction to enter a deficiency judgment in the foreclosure action, and base this contention upon section 20-2141, Comp. St. Supp. 1933, which reads: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof."

If the statute quoted is valid and is applicable to the instant case, it is clear that the court was without jurisdiction. However, the record discloses that the action

for foreclosure of the mortgage in the instant case was begun in January, 1932, and a decree entered on March 16, 1933. We will assume, for the purposes of this action, without so deciding, that the statute in question is valid, but will determine its applicability to the present proceeding.

Section 49-301, Comp. St. 1929, reads: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions found thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." It may be observed that in the enactment of the bill, of which section 20-2141, Comp. St. Supp. 1933, is a part, there is no saving clause or provision relating to actions then pending, and also that said act became effective April 26, 1933, subsequent to the commencement of the action and entry of the decree of foreclosure.

In *Thompson v. West*, 59 Neb. 677, it was held:

"In the absence of a general saving clause, the repeal of a statute will not affect a suit previously brought to enforce a right founded thereon or accrued thereunder.

"The repeal of the statute permitting the recovery of deficiency judgments did not affect actions then pending."

In *Hanscom v. Meyer*, 61 Neb. 798, it was held: "The repeal of sections 847 and 849 of the Code of Civil Procedure (Session Laws 1897, ch. 95), permitting the recovery of deficiency judgments, did not affect actions then pending."

Also, in *Ritchey v. Seeley*, 68 Neb. 120, we find this language (p. 122): "It is first insisted that the district court for Hayes county had no jurisdiction to enter a deficiency judgment against the defendants, and the act of the legislature of 1897, repealing the statute then in force allowing a deficiency judgment to be entered on the foreclosure of a mortgage, is referred to in support of plaintiff's contention. We have held in several cases that the repeal of the statute permitting the recovery of deficiency judgments did not affect actions then pending."

The above decisions were rendered with reference to an act of the legislature, passed in 1897, purporting to repeal the statute authorizing entry of deficiency judgments in foreclosure actions. However, that act was later held unconstitutional because not passed in the manner required. *Moore v. Neece,* 80 Neb. 600. Clearly, under the facts existing in the instant case, section 20-2141, Comp. St. Supp. 1933, is not applicable, and the court had jurisdiction to enter a deficiency judgment.

Defendants also contend that the court erred in entering a deficiency judgment against both defendants. The mortgage in question secured a note signed by Mary Irene Hawley and her husband. The mortgaged premises stood in the name of Mary Irene. In the petition plaintiff asked for a deficiency judgment against each of the defendants in the event the mortgaged premises did not sell for an amount sufficient to satisfy the mortgage lien. To this petition the defendants demurred, their demurrer was overruled, and they did not answer over. The decree entered found against both defendants. The finding is in this language: "That there is now due the plaintiff thereon from the makers of said note and each of them * * * the sum of $7,430.50." After the findings the decree proceeds: "Wherefore it is ordered, considered, adjudged and decreed by this court that there is due the plaintiff as above set forth from the said defendants and each of them the sum of $7,430.50."

In *Union Central Life Ins. Co. v. Saathoff,* 115 Neb. 385, it was held: "A decree of foreclosure of a real estate mortgage showing personal liability of defendant for any deficiency that may remain after sale of the mortgaged premises precludes such defendant on an application for a deficiency judgment from presenting any defense which he could or should have interposed prior to the announcement of the decree."

In *Parratt v. Hartsuff,* 75 Neb. 706, it was held: "While the decree finding personal liabilities first rendered in a foreclosure proceeding is to a certain extent interlocutory,

yet, as to findings of fact made in such decree on issues properly pleaded, it is not subject to review on objections to a deficiency judgment."

In *Stuart v. Bliss*, 116 Neb. 305, in an opinion by Chief Justice Goss, this language appears (p. 307): "Braun had notice from the allegations and prayer of the cross-petition that Bliss and Schlueter were not only asking the court to fasten personal liability on him but anticipating an insufficient sale value of the mortgaged property were seeking a deficiency judgment against him in that particular action, as authorized by section 9209, Comp. St. 1922. If he had a defense, then was the time and there the place to make it. If he did not choose to defend, he must accept the penalty of a foreclosure of his right to defend. The reason for the rule is to make an end to litigation. The trial court having once passed on the issues of fact as presented under the pleadings may not require a party to the suit over his objections to relitigate those issues."

No answer was tendered by either of the defendants in the instant case; consequently, no defense was set up as to the liability of the mortgagors and signers of the note secured by the mortgage. Defendants are now in no position at this late date to attempt any defense to their liability for deficiency judgment. When such judgment was sought in the petition against each of them, then was the time and there was their opportunity to tender any defense, if such they had.

Defendants contend that the court erred in entering a deficiency judgment without notice and without affording them an opportunity to be heard. The rule is that, where a deficiency judgment is asked in the original petition for foreclosure, in the event the sale of the mortgaged premises does not realize an amount sufficient to satisfy the mortgage lien, no notice other than the summons in the original action is necessary.

In *Graves v. Macfarland*, 58 Neb. 802, it was held: "The jurisdiction of the district court to render a de-

ficiency judgment under the provisions of section 847 of the Code of Civil Procedure did not depend upon the service of any notice other than the original summons." Judge Sullivan, in the opinion, said (p. 803):

"The court rendered a decree of foreclosure, and made a finding to the effect that the appellant had assumed the payment of Macfarland's mortgage. Afterwards, without notice, a deficiency judgment for $1,102.23 was rendered against Graves alone. * * *

"Counsel for appellants insist that the court was not authorized to render a deficiency judgment without special notice of the application therefor * * * but the statute which gave the right to a deficiency judgment in an action to foreclose a mortgage did not require it. Section 847 of the Code of Civil Procedure * * * clearly contemplated no other notice than that imparted by the original summons."

A like holding was announced in *Crary v. Buck,* 1 Neb. (Unof.) 596. See, also, *Patrick v. National Bank of Commerce,* 63 Neb. 200.

Under the above decisions, notice of the motion by the plaintiff for deficiency judgment after confirmation of the sale was not required.

The record discloses no error prejudicial to defendant. Judgment

AFFIRMED.

MARGERY HARTFORD ET AL., APPELLEES, V. MILLIE PINNIE ET AL., APPELLANTS.

FILED APRIL 19, 1935. No. 29258.

1. **Trial.** A trial court is vested with sound discretion in determining whether evidence respecting undue influence is too remote to be received.
2. **Appeal.** Rulings of the trial court in excluding evidence, on the ground that it is too remote in point of time, will not be disturbed unless it appears that the court abused its discretion.

3. **Deeds**: SETTING ASIDE: UNDUE INFLUENCE: PROOF. Where heirs at law of a grantor after her death seek to set aside a deed on the ground that it was procured by undue influence, exercised by grantee, it is proper for the grantee to prove that the grantor, over a long period of years, had frequently expressed the intention and purpose of giving the described property to grantee by deed or will.
4. **Evidence**: DEPOSITIONS. Depositions, regularly taken in an action, may be admissible in a subsequent action, involving the same issues or subject-matter. But usually, to be admissible, it must appear that the questions involved are the same and that the parties are the same.
5. **Fraudulent Conveyances**: SETTING ASIDE. An administrator of the estate of a deceased person cannot successfully prosecute an action to set aside a voluntary conveyance, executed by his intestate, unless it is shown that the indebtedness of the grantor existed at the time of the conveyance or was made in contemplation of future liability and for the purpose of defrauding prospective creditors.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Reversed.*

Merrow & Murphy, for appellants.

Robins & Yost, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

This action was brought by certain of the heirs at law of Jane A. Gillaspey, deceased, and the special administrator of her estate, to set aside a deed, executed by Mrs. Gillaspey in her lifetime, wherein she conveyed to the defendants a two-sixths interest in an 80-acre tract of land. The grounds for relief are that the deed was executed without consideration and was induced by undue influence. Trial of the cause to the court resulted in a decree for plaintiffs. Defendants have appealed.

The deed in question was executed July 31, 1930, by Mrs. Gillaspey, who was then a widow more than 80 years of age. She died in April, 1932. In 1897 Mrs.

Gillaspey owned an 80-acre tract of land, and in that year she conveyed one-sixth interest in said 80-acre tract to each of four of her children, subject to her life use of the land. At that time there were two older children who had received gifts or advancements from their father, and also two children who were minors. One of the latter is Mrs. Pinnie, a defendant, and the other Mrs. Hartford, a plaintiff. There is a suggestion, but no direct proof, that Mrs. Gillaspey retained the two-sixths interest in the 80-acre tract intending at some later time to convey that to the two minor children after they had arrived at maturity.

Early in the trial of the cause, inquiry was being made by counsel for plaintiffs as to the transaction in 1897. The court interrupted with the statement: "We ought not to go back to 1897," and then limited the time of the inquiry to a period of five years preceding the time of the trial. Defendants offered evidence, extending over a period of 10 or 15 years, wherein Mrs. Gillaspey had stated to other persons that her daughter Millie had stayed with her and taken care of her during all the years, and she intended to give the property to her by deed or will. Much of this evidence was excluded.

As to the question whether evidence is too remote to be of value on the issue of undue influence, the trial court is vested with a sound discretion, but considerable latitude, we think, should be allowed. Where a mother has executed a deed to all the land that she owns to one child, to the exclusion of all the other children, and the conveyance is attacked on the ground that it was procured by undue influence, it is permissible to prove that for a long time prior thereto she had expressed an intention to convey the land to the favored child. Where such intention is shown to have existed for many years and had been frequently expressed, it tends to show a fixed purpose of the grantor to make such conveyance, and also tends to refute the idea that it was procured by undue influence.

We are of the opinion that the trial court abused its discretion in limiting the inquiry to a period of five years previous to the time of trial. The expressions of Mrs. Gillaspey, made and oft-repeated at periods running back as far as 10 or 15 years, of her intention to convey or give the land to the favored daughter, should have been admitted in evidence. The error of the trial court in unduly restricting the examination of witnesses for defendants was prejudicially erroneous.

During the trial plaintiffs offered in evidence depositions of three witnesses that had been taken in another action and which, over objection, were admitted in evidence. Depositions, regularly taken in an action, may be admissible in a subsequent action between the same parties and involving the same question or subject-matter. In the instant case, the depositions were taken in an entirely different action; the parties, both plaintiff and defendant, were not the same, and there is no showing that the issue or subject-matter was the same. It also appears that the depositions were taken pursuant to a stipulation which provided that the evidence of the witnesses so taken should be "used as evidence at the trial of the contest of will and appointment of executrix in the above entitled matter, in the county court only." Proper objections were made to the introduction of these depositions, and we think the court committed error in not excluding them. However, it is a general rule that in an equity cause the trial court will be presumed to have disregarded any incompetent or immaterial evidence that was received at the trial.

One of the assignments of error is that the findings and decree are not sustained by the evidence. In view of the conclusions reached on other questions, it is unnecessary for the court to pass upon the question of the sufficiency of the evidence. We think it proper to remark that, with the depositions excluded and which could not be properly considered by this court, it is doubtful if the evidence is sufficient to sustain the findings.

One other question requires examination. The special

administrator was made a party. Plaintiffs assert that because there were debts existing against the estate of Mrs. Gillaspey, and because there was no property out of which they could be satisfied, the special administrator was entitled to have the deed set aside on the ground that the action was, as far as he was concerned, in the nature of a creditor's bill.

The record discloses that Mrs. Gillaspey had resided on the 80 acres in question for more than 40 years; that it was her home, and, while homestead is not pleaded, the record clearly discloses that it was a homestead. It is a rule that a homestead is not susceptible of fraudulent alienation. There is no evidence in the record as to the value of the land at the time Mrs. Gillaspey made the deed in question. Furthermore, the evidence fails to disclose that Mrs. Gillaspey was indebted to any one at the time she made the deed. The evidence is wholly insufficient to support the claim of the special administrator that the deed should be vacated on the ground that it was a voluntary conveyance and in fraud of creditors.

Under the statutes, this court has jurisdiction, in an appeal in an equity case, either to reverse the judgment and dismiss the action or remand it for further proceedings, where the judgment cannot be affirmed. We are unable to say what the judgment might have been, had the errors in the admission and exclusion of evidence not occurred, and justice would be promoted by reversing the judgment and remanding the cause for a new trial, rather than dismissing the action. Such is the order of this court.

REVERSED.

KATIE WIDMAIER, APPELLEE, V. ROSE M. ARNDT ET AL., APPELLANTS.

FILED APRIL 19, 1935. No. 29264.

Bills and Notes: PAYMENT: PROOF. To establish defense of payment in a suit on negotiable promissory note, defendant must prove payment to the holder or someone authorized by the holder to receive payment.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Bruckman & Dunmire, for appellants.

J. E. Ray and *Earl L. Hunter, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

GOOD, J.

Plaintiff sued to recover upon a past-due negotiable promissory note. Defendants pleaded payment. Trial of the issues to a jury resulted in a verdict for plaintiff on which judgment was entered. Defendants have appealed.

In view of the conclusion we have reached and hereinafter state, it is unnecessary to consider any of defendants' assignments of error.

Defendants contend that payment of the note in question was made to Hoeppner and Uerling and that they were the agents of the plaintiff authorized to receive such payment. The record discloses that Hoeppner and Uerling, copartners, were for many years engaged in the loan brokerage business in Hastings, Nebraska; that they made long-time loans which were frequently represented by a series of coupon notes or bonds, secured by real estate mortgages; that such mortgages and notes were made payable to Hoeppner and Uerling or to a member of the copartnership. The borrowers paid to Hoeppner and Uerling a commission for making the loans. After they were made, the coupon notes or bonds were sold to various parties. Usually the borrowers paid the in-

terest when due to Hoeppner and Uerling, and the holders of the notes or bonds came to Hoeppner and Uerling and received their interest payments from them.

In 1924 defendants executed a series of 26 coupon notes, due five years after date, interest payable semi-annually, represented by coupon notes and secured by a real estate mortgage. The notes and mortgage ran to Hoeppner. Hoeppner and Uerling sold one of this series of notes to the plaintiff, who has ever since owned and retained possession thereof. When interest payments were due, defendants went to the office of Hoeppner and Uerling and paid the interest on the entire series of notes, and plaintiff would go to the office of Hoeppner and Uerling, take and deliver to them her coupon then due, and receive payment from them. Defendants were aware of the fact that the notes had been sold and were in the hands of various parties. They would not receive their coupons at the time they made the interest payments, and it would be some weeks before all of the coupons would be received by them.

In April, 1929, and six months before the maturity of these notes, defendants desired to renew their mortgage loan and increase the amount thereof. Hoeppner and Uerling made them a new loan for $30,000, represented by a series of notes, secured by mortgage on the same real estate. Hoeppner released the first mortgage. Defendants received from Hoeppner and Uerling $4,000, the difference between the amount of the original loan and the new one. Of the proceeds of the new loan $26,000 was left in the hands of Hoeppner and Uerling. It was the understanding and agreement between them that Hoeppner and Uerling were to pay, take up and deliver to defendants the notes representing the first loan. Defendants were then aware of the fact that the notes representing the first loan, or some of them, were outstanding, in the hands of other parties. They did not receive the old notes at the time they executed the new loan. Thereafter they did receive some of the notes from

Hoeppner and Uerling. Hoeppner and Uerling did not make any payment to plaintiff on the principal of her promissory note, nor inform her that the loan had been renewed, or that the first mortgage had been released, but led her to believe that a new loan would be made in the future, out of which she would be paid. Hoeppner and Uerling continued to make payments of interest to the plaintiff upon her promissory note.

The evidence of defendants conclusively shows that they left with Hoeppner and Uerling $26,000 of the proceeds of the second loan, with the distinct understanding and agreement that Hoeppner and Uerling would take up and secure the notes representing the first loan and return them to defendants. Defendants' evidence establishes beyond question that Hoeppner and Uerling were their agents in this transaction. Hoeppner and Uerling violated the trust reposed in them by defendants. For this plaintiff is not responsible.

The evidence is insufficient to support a finding that Hoeppner and Uerling were the agents of plaintiff, with authority from her to receive payment of the principal of the note. To establish defense of payment in a suit on negotiable promissory note, defendant must prove payment to the holder or some one authorized by the holder to receive payment.

Upon a consideration of the entire record, it is clear that a judgment for defendants could not be sustained, and that no other judgment than one for plaintiff could be sustained. It follows that any error committed by the trial court was not prejudicial to defendants.

The judgment is right and is

AFFIRMED.

CENTRAL BRIDGE & CONSTRUCTION COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

MIDWESTERN & PACIFIC CONSTRUCTION COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 19, 1935. NOS. 29252, 29253, 29254.

1. **State Railway Commission**: ORDERS: ENFORCEMENT. Where the state railway commission makes an award for repayment of an unjust or unlawful rate or charge, it may be enforced by the claimant by an action in the district court for the district through which the railroad runs or in any state court having jurisdiction of the parties.
2. ———: ———. In an action to enforce an award of the state railway commission for the repayment of an unjust and unlawful charge by a railroad company, the finding and the order shall be *prima facie* evidence of the facts therein stated.

APPEALS from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Wymer Dressler, Robert D. Neeley and *Hugo J. Lutz,* for appellant.

Lester L. Dunn, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

DAY, J.

These cases were briefed and argued together in this court. They were tried at one time in the district court, and there is one bill of exceptions. The judgments were identical in form and differ only in the amounts. The plaintiffs filed claims before the state railway commission for freight charges which they had paid but claimed were excessive. The state railway commission ordered a refund which the company did not pay. Thereafter,

plaintiffs filed an action in the district court to enforce payment of this award.

The state railway commission was created by the Constitution with power to regulate rates and to exercise general control of railroads as the legislature may provide by law. In the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision. Section 20, article IV of the Constitution, and the legislation enacted thereunder, have been considered many times by this court. It has uniformly been held that the commission is vested with power to regulate rates for and to exercise control of railroads.

Under this grant of constitutional authority, the state railway commission has established tariffs for freight on the railroads of Nebraska including the defendant herein. From time to time the legislature has enacted statutes directing the manner in which the state railway commission may exercise its control. In 1921 it enacted what is now sections 75-510 to 75-512, Comp. St. 1929. These statutes are specific as to the manner rates may be regulated. It provides in these sections that, in case a railroad company is paid unjust or unreasonable rates or charges, the shipper may file a complaint within two years with the state railway commission. If the commission shall determine that the rate is unjust, unreasonable, or unlawful, it may make an order requiring repayment.

The appellant urges as a defense that the claim was not filed within two years. It is a well-known rule that a statute of limitations must be pleaded and is an affirmative defense. The state railway commission made an order for repayment. In so doing it made an order determining rates. The order may have been erroneous, but no appeal was taken from the order. A transcript of its proceedings must be filed within three months from the date of the final order to give the supreme court jurisdiction. *Barth v. Lincoln Telephone & Telegraph Co.*, 122

Neb. 325. This is necessary to obtain a reversal, modification, or vacation of any order. Comp. St. 1929, sec. 75-505. This section authorized the railroad company to appeal from the order which is the basis of the judgments herein.

It is urged that the rates were lawful and in accordance with the published tariffs at the time. This is a question peculiarly within the purview of the state railway commission. It is its duty under the Constitution to determine the rate and its applicability. When it had determined this, it was made the duty of the court to enforce such order. The function of the court in this case is somewhat analogous to that it exercises in an action on a foreign judgment.

Section 75-511, Comp. St. 1929, prescribes the manner of bringing an action to enforce the order. Where the state railway commission makes an award for repayment of an unjust or unlawful rate or charge, it may be enforced by the claimant by an action in the district court for the district through which the railroad runs or in any state court having jurisdiction of the parties. One of these cases was commenced before a justice of the peace of Lancaster county which had jurisdiction of the parties. Any such state court has jurisdiction of the subject-matter.

In an action to enforce an award of the state railway commission for the repayment of an unjust and unlawful charge by a railroad company, the finding and the order shall be *prima facie* evidence of the facts therein stated.

The state railway commission has constitutional authority to exercise executive, legislative, and judicial power. It is sometimes difficult to differentiate the various powers exercised in a given order. But in the fixing of rates and the regulation of common carriers the commission exercises legislative power. The courts do not have such broad constitutional powers, but are limited solely to an exercise of judicial power. The courts cannot fix a rate or regulate a common carrier. In reviewing orders of the

railway commission which require the exercise of legislative authority, the courts can only determine the limitation of power and the reasonableness of the regulation. Such an order demands the same consideration by the courts as an act of the legislature. There were no appeals from the order of the commission making an award against the defendant. It was the duty of the court to enforce the order and enter the judgment.

AFFIRMED.

BEN H. FAST V. STATE OF NEBRASKA.

FILED APRIL 19, 1935. No. 29415.

ERROR to the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed as modified.*

Waring & Waring, for plaintiff in error.

William H. Wright, Attorney General, and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

DAY, J.

The defendant prosecutes this proceeding in error from a conviction in the district court of the unlawful possession of intoxicating liquor for the purpose of sale. It was charged that it was his third offense.

The defendant urges as error that the evidence is not sufficient to support the conviction under section 53-103, Comp. St. 1929. However, the information is sufficient under section 53-102, Comp. St. 1929, and the evidence amply supports the verdict thereunder. *Knothe v. State*, 115 Neb. 119; *Verbeck v. State*, 127 Neb. 503.

The sentence was eighteen months in the penitentiary. The two former convictions occurred ten years before the time of defendant's present arrest. The only evidence

of sale was conversation of defendant with arresting officers. There was not an unequivocal admission, but it was sufficient to present a question of fact. However, the record does not reveal a necessity for a severe sentence. It seems that six months in the penitentiary is ample to meet the exigencies of this case, and the sentence is hereby reduced under section 29-2308, Comp. St. 1929, to six months in the penitentiary.

AFFIRMED AS MODIFIED.

GERTRUDE PETTEGREW, APPELLANT, V. IVAN D. PETTEGREW, APPELLEE.

FILED APRIL 23, 1935. No. 29213.

1. **Dismissal.** Under the Nebraska statute relating to the dismissal of actions, a dismissal is not demandable as a right after the cause has been fully tried and unconditionally submitted to the court. Comp. St. 1929, sec. 20-601.
2. **Appeal:** JUDICIAL DISCRETION. A ruling that involves judicial discretion is subject to review for an abuse thereof.
3. ———: ———. In appellate proceedings, an abuse of discretion by the trial judge does not imply improper motive, wilful purpose, prejudice, partiality or intentional wrong.
4. ———: ———. In the exercise of judicial discretion, there is an abuse of that power where the reasons and rulings of the court are clearly untenable and deprive a party of a substantial right clearly and fairly established and amount to a denial of justice.
5. **"Discretion,"** when invoked as a guide to judicial action, is a sound discretion exercised with regard to what is right and equitable under the circumstances and the law and directed by the reason and conscience of the judge to a just result.
6. **Divorce:** DISMISSAL: ABUSE OF DISCRETION. After trial of a cross-action by a husband against his wife for a divorce, unconditional submission of the cause to the court for a decision and announcement from the bench that the charges against the wife were not proved, a dismissal of the cross-action without prejudice to a future action involving the same charges *held* an abuse of discretion under the circumstances shown by the record for review.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Judgment modified.*

Ziegler & Dunn, for appellant.

H. T. White, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ.

ROSE, J.

Gertrude Pettegrew, plaintiff, and Ivan D. Pettegrew, defendant, were married May 27, 1918. Plaintiff sued defendant for a divorce March 14, 1932, but withdrew her plea therefor and, by amended petition filed December 14, 1932, prayed for separate maintenance for herself and daughter, their only child, then three years of age, and for continued custody of her. It was alleged in the amended petition that defendant, without cause or provocation, deserted plaintiff October 30, 1930, and thereafter lived separate and apart from her, and that he had been guilty of extreme cruelty toward her prior to the desertion pleaded.

In an answer and cross-petition, defendant denied alleged desertion of plaintiff without cause, denied he had been guilty of extreme cruelty toward her, accused her of extreme cruelty toward him, giving details, and prayed for an absolute divorce from her and for the fixing of a reasonable sum for the support of plaintiff and the child.

Upon a trial of the cause, the district court found that plaintiff was entitled to custody of the child and to support for both and ordered defendant to pay his wife $100 a month, but he was permitted to dismiss his cross-petition for a divorce without prejudice to a future action. The cross-petition was so dismissed and from the judgment reserving to defendant the privilege of relitigating his charges that plaintiff had been guilty of extreme cruelty she appealed.

On the record presented for review, should the judgment dismissing the cross-petition of defendant for a

divorce without prejudice to a new action be so modified as to prevent future litigation of the previously tried issues involving the charges of plaintiff's extreme cruelty toward defendant? That is the question presented for determination.

The position taken by plaintiff is that after the issues as to her alleged extreme cruelty toward defendant were fully tried, after the cause was submitted to the court and after a ruling thereon in her favor was announced from the bench, defendant presented a motion for permission to dismiss his cross-petition without prejudice to a future action and that the motion was improperly and erroneously sustained to the prejudice of plaintiff.

On the other hand, defendant confidently argued that the district court took the cause under advisement for further consideration, that a final decision had not been rendered when the motion was made, that it was within the discretion of the trial judge to sustain the motion and that he did so without any abuse of discretion.

The record of the decree recites that the cause was finally submitted to the trial court upon the evidence and arguments of counsel July 12, 1933, that the motion to dismiss the cross-petition was filed September 27, 1933, and that the decree was dated February 16, 1934. The bill of exceptions shows there was a hearing on the motion February 15, 1934, with counsel for both sides present. The final decree, however, had not been signed or entered on the court journal when the motion was filed, nor at the time of the hearing thereon, but the district judge stated, referring to the trial on the merits of the cause:

"The court at the close of the trial indicated that in its judgment the court was of the opinion that the proof of the cross-petitioner and the corroboration thereof was not sufficient to justify the court in granting a divorce to the cross-petitioner."

The same opinion was entertained by the trial judge when he ruled on the motion, because he then said from the bench:

"There was no evidence on the cross-petition to justify a divorce. The court is satisfied that no court could ever grant the defendant a divorce under the record."

The reasons for permitting defendant to relitigate what had already been tried and submitted for judgment was stated by the district judge as follows, when ruling on the motion:

"However, the matter before the court now, in its judgment, is discretionary with the court. If the parties involved are not able to be reconciled through the years, then there may come a time when a divorce might be desirable. And if it is ever heard again before a judge, it would seem to this court fair to both these parties to have the entire picture before the court. If the motion to dismiss is denied, then only a one-sided picture will be before the court, as I view it."

A preponderance of the evidence considered by the court below on the motion tends to prove the following facts: The cause was tried on its merits for three days, June 27, 28 and 30, 1933, and was argued and submitted July 12, 1933. Shortly thereafter the district court directed counsel for plaintiff to prepare a decree in her favor on her petition and against defendant on his cross-petition. A decree was accordingly prepared and delivered to the trial judge who said he would sign the decree within a short time, after notice to counsel for defendant in the presence of counsel for both sides in court. No action was taken on the decree until August 29, 1933, when the district judge notified counsel for plaintiff by letter that opposing counsel desired to file a motion to dismiss the cross-petition without prejudice to a new action.

Under the circumstances, did the trial judge abuse his discretion in sustaining the motion? There was nothing to indicate newly discovered evidence or any other ground for granting defendant a new trial, or any misconduct or fraud vitiating the proceedings. The parties tried the cause and submitted it to the court. Further evidence or argument or information was not requested by the court.

What remained was judicial action. The rights and obligations of the parties under the pleadings and evidence were ready for judgment. The stress and burden of the trial had been borne by the litigants. Plaintiff was entitled to the fruits of the trial and of a victory clearly won. It does not seem just or equitable to deprive her of that right under the circumstances. To permit defendant to harass her with another action and trial on the same issues appears to be unjust. There is more to the controversy than the rights and obligations of the parties. The public burden of a second trial and the best interests of the child should have been considered. The mother is adjudged to be a fit person to have the custody of her infant daughter. The menace of renewed charges that the mother treated her husband with extreme cruelty and the prospect of another public trial for a divorce are not calculated to promote the best interests of the child when mingling with other children at school and elsewhere. The hope of a reconciliation is not a sufficient ground for the denial of relief to which the wife was entitled, under the pleadings and the evidence, or a justification for the discretion exercised. After a desertion of three years, after defendant made his unfounded charges of extreme cruelty for the purpose of a divorce, and after a protracted trial, there should have been a more substantial reason than that given for permitting relitigation of the same issues in the hope of a reconciliation.

The United States circuit court of appeals, eighth circuit, commented on the Nebraska statute and the decisions relating to the right of dismissal and said:

"In our opinion the rule prevailing in Nebraska is not obscure. The privilege of dismissal without prejudice is not demandable as of right after a case has been submitted to court or jury, whether upon demurrer to the evidence, motion for directed verdict, or generally upon conclusion of the evidence; but may be granted by the court in the exercise of its discretion; and, in the absence of a clear showing of abuse of discretion, such action

should be sustained. Without doubt the courts should be alert to prevent defeated litigants from arbitrarily abandoning their cases for the obvious purpose of suing again, thus harassing defendants, and committing unwarranted waste of public money; but the court's discretion in the premises is essential to the rights of both parties." *Iowa-Nebraska Light & Power Co. v. Daniels,* 63 Fed. (2d) 322.

A ruling that involves "judicial discretion" is subject to review. In appellate proceedings an abuse of discretion by the trial judge does not imply improper motive, wrongful purpose, prejudice, partiality or intentional wrong. The supreme court of Iowa said:

"If the reasons given by the court for its action are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason and evidence, it has abused its discretion." *State v. District Court,* 213 Ia. 822, 80 A. L. R. 339.

What is meant by judicial "discretion" is indicated by the following excerpt from an opinion by the supreme court of the United States:

"The term 'discretion' denotes the absence of a hard and fast rule. *The Styria v. Morgan,* 186 U. S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Langnes v. Green,* 282 U. S. 531, 541.

This is also the rule of the Massachusetts decisions. *Commonwealth v. Gallo,* 275 Mass. 320. In *Bee Bldg. Co. v. Dalton,* 68 Neb. 38, Chief Justice Sullivan quoted with approval the following language from a Kansas case:

"Where a demurrer to the evidence is sustained, the case is ready for judgment. It has been finally submitted to the court, and the plaintiff has no more right to dismiss then than he has after a verdict is returned. The

case is decided, and the plaintiff has no right to avoid that decision by a dismissal." *St. Joseph & D. C. R. Co. v. Dryden,* 17 Kan. 278.

In the same Nebraska opinion Chief Justice Sullivan said:

"To permit a party to dismiss under such circumstances is, in substance, to grant him a new trial after he has been fairly defeated and to deprive his adversary of the fruits of a fairly won victory. It is contrary to good sense and sound policy to allow a party to take his case from one court to another until fortune favors him with a judge who is willing to accept his view of the law or his construction of the evidence. * * * One who is defending against a claim which he believes to be unjust ought not to be subjected to the expense of litigation which settles nothing. And since he is not permitted to choose another forum when it is discovered that the court is against him, it is manifestly unfair to give the plaintiff an unlimited freedom of choice. The tax-paying public, too, have rights which it may be presumed the legislature took into account in adopting section 430. (Comp. St. 1929, sec. 20-601.) It is, of course, entirely proper that courts should be maintained at public expense to hear and determine all controversies that may be submitted to them, but it is no part of the business of the state in administering justice to provide for sham trials, or to maintain courts for experimental investigation. Indeed, it would be a reproach to our judicial system to permit a defeated litigant to abandon his case and sue again, thus harassing the defendant and wasting money raised by taxation for public purposes."

In view of the established facts and the law applicable thereto, the conclusion is that there was a clear abuse of discretion on the part of the district court in sustaining the motion for a dismissal of the cross-petition without prejudice to a new action. The judgment from which the appeal was taken is therefore modified to dismiss the cross-action of defendant with prejudice to a future action

for a divorce on the grounds alleged in his cross-petition herein. Defendant is required to pay the costs of the appeal and a fee of $100 for the services of counsel for plaintiff in the supreme court.

JUDGMENT ACCORDINGLY.

FRANK L. POLLARD ET AL., APPELLEES, V. ROYAL HIGHLANDERS, APPELLANT.

FILED APRIL 23, 1935. No. 29257.

1. Insurance: STATEMENT BY ASSURED: CONSTRUCTION. In construing a statement, signed by an assured to obtain a revival of her policy, to determine whether it was intended by the parties thereto to be a warranty or a representation, the court will take into consideration the situation of the parties, the subject-matter of the contract, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties.
2. ———: ———: ———. "An incorrect or untrue answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy if made in good faith and without intention to deceive." *Royal Neighbors of America v. Wallace*, 73 Neb. 409.
3. ———: ———: ———. A statement, signed by the assured in compliance with the by-laws of a fraternal beneficiary association to obtain a revival of her policy, in which the assured states that she is of sound constitution and good health, is a representation, and not a warranty.
4. ———: ———: PROOF. In order to defeat a recovery because of the falsity of a representation, the company must prove that the representation was untrue, that it was made by the assured knowingly with the fraudulent intent to mislead and deceive, that it was material to the risk, and that it was relied on by the company.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

L. A. Flansburg, O. B. Clark and *E. S. Schiefelbein*, for appellant.

J. H. Barry, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

CARTER, J.

This is an action at law commenced by the appellees as beneficiaries under a certificate of insurance issued to Catherine A. Pollard in her lifetime by the Royal Highlanders, a fraternal beneficiary society for the amount of $1,000. The appellees obtained a verdict and judgment for the full amount of the policy. From the overruling of its motion for a new trial, the appellant appeals.

The evidence in this case discloses that Catherine A. Pollard was issued a certificate of insurance for $1,000 on June 1, 1930. Under the provisions of that certificate she was required to pay $4.70 a month, and a failure to so do suspended her membership and rendered the policy void. The payments for June and July were paid, but she failed to make the payments due in August of 1930 and the months following up to and including January, 1931. On February 9, 1931, Catherine A. Pollard forwarded a check for all delinquent payments to the main office of the appellant at Lincoln, Nebraska, together with a certificate of good health, as required by the society in order to secure a reinstatement of the policy. The certificate of good health was in part as follows: "This is to certify that I, * * * desiring to become reinstated, do declare, guarantee and warrant on my honor that I am not engaged in any prohibited occupation of this society, that I am of sound constitution, good health and temperate habits, and that since the date of my application, I have sustained no personal injury, nor been afflicted with any disease or sickness from which I am not now fully recovered. This statement is given as a part of the consideration for my reinstatement, and I agree that, if the above statements be untrue in any respect, this reinstatement shall be void."

The appellant contends that Catherine A. Pollard was

not in good health at the time she made application for reinstatement; that her statements in the certificate of good health were warranties upon which appellant could rely, and, they being untrue, the policy was void. Appellant tendered back the premiums paid and denied liability.

The trial court instructed the jury on the theory that the statements of Catherine A. Pollard were representations and not warranties as contended by the appellant. The first question to be determined is whether the statements of Catherine A. Pollard contained in the certificate of good health are representations or warranties of her then physical condition.

In *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329, it was held: "It is definitely settled by this court, through a long line of cases, that, in determining whether statements made in an application for insurance are warranties or representations, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties. * * * It is equally well settled as the law of this state that a distinction is recognized between questions in an application which call for statements of conclusions of fact not expressly within the knowledge of the applicant, and in regard to which the insurance company has equal means of ascertaining for itself the truth, and, on the other hand, questions which call for information regarding facts necessarily and peculiarly within the knowledge of the applicant. It is held that an incorrect or untrue answer in an application for life insurance in reference to matters of opinion will not void a policy, but that an untrue answer in an application for life insurance as to matters which are peculiarly within the knowledge of the applicant, and material to the risk, will void the policy."

In *Royal Neighbors of America v. Wallace*, 73 Neb. 409, it was held: "An incorrect or untrue answer in an appli-

cation for life insurance in reference to matters of opinion or judgment will not avoid the policy if made in good faith and without intention to deceive."

In the case of *Aetna Life Ins. Co. v. Rehlaender,* 68 Neb. 284, the insured executed a certificate of good health containing the following provision: "I hereby certify that said Rudolph L. Rehlaender is now in good health, and that there is nothing in his habits or condition which is likely to impair his health or shorten his life." This was held to be a representation, and not a warranty.

In *Beeler v. Supreme Tribe of Ben Hur,* 106 Neb. 853, the applicant answered certain questions as follows: "How long since you consulted or were attended by a physician? One year." "For what disease? La grippe." "Have you had any severe illness or injury not mentioned above? No." The defendant offered evidence tending to show that the applicant had been treated shortly before for bronchitis and pneumonia and had previously suffered from heart trouble. The court in that case said: "We have no hesitancy in holding that the statements of assured in the application complained of are representations, and not warranties."

The chief distinction between a warranty and a representation in insurance law is that the former is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact; while a representation is also the assertion by the assured of a fact, but the validity of the policy does not depend upon the literal truth of said assertion. *Aetna Ins. Co. v. Simmons,* 49 Neb. 811. We, therefore, hold that the statements made by Catherine A. Pollard in the certificate of good health in the case at bar are representations, and not warranties.

The law is also well settled in this state that, in order to defeat a recovery because of representations made to the insurer alleged to be false, the insurer must prove that the representations are untrue, and were made by the assured knowingly with the fraudulent intent to mis-

lead and deceive, that they were material to the risk, and were relied on by the defendant. *Aetna Life Ins. Co. v. Rehlaender, supra; Kettenbach v. Omaha Life Ass'n,* 49 Neb. 842; *Beeler v. Supreme Tribe of Ben Hur, supra.* The jury passed upon these questions and found for the plaintiff below. Does the evidence sustain the verdict?

The evidence shows that in September, 1930, the insured was ill with an attack of influenza from which she apparently recovered. From December 4, 1930, to December 20, 1930, she was in a hospital at Columbus, Nebraska, suffering from a heart ailment causing an impaired circulation. She was attended by Dr. Frank H. Morrow while at the hospital and was discharged therefrom by him on December 20, 1930, at which time he told her that he thought she was fully recovered. Dr. Morrow saw her again on January 22, 1931, and on February 1, 1931, and, while he advised her to continue the taking of medicine and to take care of herself, the record does not disclose that she was ever subsequently informed by Dr. Morrow that she was not fully recovered.

The evidence further shows that, at the time Catherine A. Pollard sent the certificate of good health to the appellant, it was accompanied by a certificate signed by Dr. S. B. Koory of Schuyler, Nebraska, as follows: "I hereby certify that I have carefully examined into the physical condition of Mrs. Catherine A. Pollard herein named and find her to be in good health this 20 day of Jan. 1931, and recommend her as being qualified to be reinstated to beneficial membership in the Royal Highlanders." This statement would have a tendency to assure Mrs. Pollard that she was not then afflicted with any disease or sickness from which she was not fully recovered. The evidence of the physicians was supported by members of the family of the deceased to the effect that the conduct and statements of Mrs. Pollard disclosed that she thought she was at that time fully recovered. Dr. W. E. Doane of North Bend, Nebraska, testified that he attended Mrs. Pollard on and after March 15, 1931, more than a month

after her reinstatement, and that she was at that time ill with myocarditis and that her general condition was bad. Dr. Doane testified that Mrs. Pollard told him that she was in the hospital at Columbus and that she did not think she would get well. We are of the opinion that the evidence raises a question of fact for the jury to determine as to whether Mrs. Pollard made an untrue statement and whether she made it knowingly with intent to deceive. The jury having determined these facts under proper instructions of the court, they are conclusively established so far as this case is concerned. The evidence is sufficient to sustain the verdict.

We find no error in the record, and the judgment of the trial court is therefore affirmed, with an allowance to appellees of $100 as an attorney's fee for services in this court to be taxed as part of the costs.

AFFIRMED.

PAUL HOWARD, APPELLANT, V. STEVE GERJEVIC ET AL., APPELLEES.

FILED APRIL 23, 1935. No. 29134.

1. **Appeal:** PEREMPTORY INSTRUCTION. "In reviewing a peremptory instruction in favor of defendant, issuable facts, which the evidence in favor of plaintiff tends to prove, will be regarded as established." *Gilbert v. Bryant*, 125 Neb. 731.
2. **Automobiles:** GROSS NEGLIGENCE: QUESTION OF FACT. The existence of gross negligence in an action for personal injuries under the guest statute (Comp. St. Supp. 1931, sec. 39-1129) is ordinarily a question of fact, and where the evidence in relation thereto is such that minds may reasonably reach different conclusions as to its existence, such question should be submitted to the jury for their determination.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Marcell & Caldwell and *Brome & Thomas*, for appellant.

Kennedy, Holland & De Lacy and *E. J. Svoboda, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, PAINE and CARTER, JJ., and CHAPPELL, District Judge.

CHAPPEL, District Judge.

This is a law action brought by Paul Howard, plaintiff and appellant, against Steve Gerjevic, owner of an automobile, and Steve Poznich, the driver thereof, defendants and appellees, on account of personal injuries sustained by plaintiff while riding in the car as an invited guest. At the conclusion of plaintiff's evidence, upon motion of counsel for defendants, the trial court directed a verdict for defendants and entered judgment thereon. Motion for new trial was overruled, and appeal is taken to this court.

There is but one question for our decision: Was the evidence adduced by plaintiff in the trial court sufficient to present an issue of fact for the jury on the question of gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, commonly known as the Nebraska guest statute?

In reviewing the action of the trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish. *Bainter v. Appel,* 124 Neb. 40; *Preston v. Stover,* 70 Neb. 632; *Kepler v. Chicago, St. P., M. & O. R. Co.,* 111 Neb. 273; *Gilbert v. Bryant,* 125 Neb. 731. Bearing this in mind, the evidence discloses that on Sunday, May 15, 1932, Steve Gerjevic, who owned an old 1924 Dodge touring car, gave his car keys to Steve Poznich and asked him to drive his (Gerjevic's) car to Fort Crook, Nebraska, and collect a bill for him. Plaintiff and two other men, while in the presence of Gerjevic and each other, were invited to ride with him. They accepted this invitation and, Poznich driving the car, proceeded to Highway No. 75, a regular paved highway, and thence on south towards Fort Crook to the point of the accident. Plaintiff testified that on the way out he told the driver several times to not drive so fast; that in his estimation he drove too fast; that the

car was swaying or zigzagging one way and then the other, and going faster than he cared for; that, while so weaving and going pretty fast, they passed a Ford car, and that he then warned the driver to not drive so fast, to which the driver paid no attention; that, after passing the Ford a short distance and while the car was still swaying, the driver turned around to talk to some one, and while looking back at the guests or at the car just passed and still talking, with only his left hand on the steering wheel, his right arm held like this (indicating), the car went in the ditch. From this time on the plaintiff was unconscious and remembered nothing about the accident. Mike Ninkovich, another occupant of the car, verifies all this and says that he warned the driver four or five times to watch out how he drove as the car was swerving back and forth, to which the driver paid no heed, but said, "Never mind, I am doing this;" that, as they passed the Ford, the car was swerving more, and he was going to jump out, that he was scared; that, as they passed a car which was traveling north, they went into the ditch.

Edward Hines, a trucker who lived near the scene of the accident and who was a wholly disinterested witness, never having known any of the parties, testified that he stood on his own property close to the fence which ran along about two feet from the highway line on the east side of the road and saw the accident happen right in front of him; that he first observed the Dodge car coming about 300 feet north of him; that his attention was called to it by the unusual noise of the car, which he thought was going about 40 or 45 miles an hour at the time of the accident; that just after the car passed a Ford it began to swerve, and that it made a larger swerve each of three times until it turned over; that at the last swerve, the car turned end for end, the left hind wheel struck the shoulder of the road and it turned over just like you would flop a fish, and went down in a ditch about five feet deep; that each time the car swerved it would leave

tire marks, skid marks, which he observed on the pavement.

Dr. Joseph P. Swoboda, the physician who treated the injured guests, testified that when he got to the hospital the driver, Poznich, was then on the operating table and he treated him first, at which time he detected the odor of liquor on the driver's breath, but could not say that he was intoxicated. It is conceded that the evidence does not disclose that the driver was intoxicated, but we believe that this testimony is a circumstance which the jury may take into consideration when they pass upon the question of whether or not the defendant driver was guilty of gross negligence under the circumstances.

We have construed the guest statute in several cases since its adoption, the first of which is *Morris v. Erskine,* 124 Neb. 754. In that case the court said:

"We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary, or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine."

In *Gilbert v. Bryant,* 125 Neb. 731, we said: "When the Nebraska guest law of 1931 was enacted, a remedy for negligence resulting in personal injuries to a motorist's guest existed under the constitutional provision that 'every

person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law.' Const. art. I, sec. 13. The lawmakers did not intend to destroy entirely the civil remedy of a guest or to incumber the remedy with restrictions that would prevent a recovery for damages in a proper case. They did not define 'gross negligence' or use in connection with those words any such terms as 'abandoned, monstrous and approximately wanton disregard of safety' or 'intentional indifference to the danger.' They intended, of course, to increase, beyond want of ordinary care or slight negligence, the degree of negligence essential to the right of a motorist's guest to recover damages for personal injuries." See, also, *Morris v. Erskine, supra; Swengil v. Martin,* 125 Neb. 745; *Sheehy v. Abboud,* 126 Neb. 554; *Belik v. Warsocki,* 126 Neb. 560.

Appellee cites the case of *Thurston v. Carrigan,* 127 Neb. 625. The authority is not in point, as the court distinguished that case from the one at bar with this observation: "In the cases of *Morris v. Erskine, supra, Gilbert v. Bryant,* 125 Neb. 731, *Swengil v. Martin,* 125 Neb. 745, and *Sheehy v. Abboud,* 126 Neb. 554, wherein the guest was permitted a recovery, the imminence of danger was apparent to the driver and he was cautioned by the guest, but persisted in his negligent driving. The facts in each of those cases disclose that the driver was at least heedless of the consequences which might ensue by his reckless operation of the car, which involved, not only the rate of speed, but included other conditions which enhanced the peril and which were open to the driver."

We have not overlooked the able and exhaustive brief filed by the attorneys for appellees. The contentions made by them are not without precedent from other states, but this court believes that it has adopted the better view, the construction intended by the legislature in the adoption of the act. Bearing this in mind, we conclude that, under all the evidence adduced, reasonable minds might draw different conclusions as to whether the driver

was guilty of gross negligence. The cause should have been submitted to the jury for their determination.

A careful reading of the record disposes of appellees' contention that there is no charge or allegation of gross negligence in the petition. While probably not in the best form and far from a model pleading, the petition states a cause of action upon both alternatives of the guest statute. The trial proceeded and was concluded by the parties and the court on the theory that gross negligence had been charged, and, when considered as a whole, it will support a judgment in favor of plaintiff if recoverable under the evidence. *Gilbert v. Bryant, supra.*

For error in directing a verdict in favor of the defendants, this cause is reversed and remanded for further proceedings.

REVERSED.

LOIS C. RANKIN, APPELLEE, V. EDWARD C. BIGGER, APPELLANT.

FILED APRIL 23, 1935. No. 29233.

Fraud. One who has been induced by fraud to enter into a contract may affirm the contract and maintain an action to recover the damages he has sustained or may set up such damages by way of defense or counterclaim. Where he has thus affirmed and set up the fraud in an action upon an obligation arising out of the contract, the burden is upon him to establish the amount of his damages, and an instruction so advising the jury is not erroneous.

APPEAL from the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

William Niklaus and *J. E. Mockett,* for appellant.

Beghtol, Foe & Rankin, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

LIGHTNER, District Judge.

Suit on a promissory note. Defense fraud. Finding for plaintiff, and defendant appeals.

The $500 note in suit is part of the consideration given in December, 1930, for a one-third interest in a patent right on a wrench. The agreed consideration for such interest was $5,000, part of which was paid in cash and the balance represented by notes, some of which have since been paid. Plaintiff is not an innocent holder and any defenses defendant may have are still available to him.

The defense pleaded is fraud in the sale of the patent right, in that the seller as an inducement to cause defendant to purchase falsely represented to him that a patent broker had offered the sum of $20,000 for the right to make, use and vend such patented wrench. He alleges he purchased by reason of such false representations, and that the one-third interest was not worth $5,000, and not worth in excess of $500, and that he has been damaged in the amount of $5,000.

The error complained of as grounds for reversal is that the court in instruction No. 7 placed the burden upon the defendant of proving the amount of his damages on account of the fraud. The defendant insists that proof of fraud and the damages resulted therefrom is a complete defense to the note regardless of the amount of the damages. The gist of his theory is contained in an instruction which he tendered, which after stating the essential elements necessary to constitute fraud concluded in the following language: "That, in reliance upon said representation, the said Edward C. Bigger executed the original promissory notes to his damage; then your verdict shall be for the defendant." The law does not sustain defendant's contentions. A person who has been defrauded has an election of remedies. In 27 C. J. 18, it is said: "One who has been injured by fraud may elect to accept the situation created by the fraud and seek to recover his damages or he may elect to repudiate the transaction and

seek to be placed *in statu quo*. For example, * * * one who by fraud has been induced to enter into a contract may affirm the contract and maintain an action to recover the damages which he has sustained, or may set up such damages by way of defense or recoupment or counterclaim, or he may rescind the contract and avail himself of the remedies based upon a rescission, or he may sue in equity in a proper case to cancel or rescind the contract, or to secure a reformation of the instrument. This right of election applies, for example, to one who has by fraud been induced to enter into a contract for the purchase or sale of real or personal property."

In this case there was no rescission. The contract was affirmed and the defendant set up his damages as a defense. It was therefore necessary for him to establish the amount of his damages. In such cases the measure of damages is generally the difference in value between the article or thing purchased if it had been as represented and its actual value. It was held in *Reed v. Occidental Bldg. & Loan Ass'n*, 122 Neb. 817: "To state a cause of action for fraud or conspiracy to defraud, it is necessary for the pleader to allege not only the conspiracy and the doing of the fraudulent acts, but also facts showing that damage resulted therefrom." In the body of the opinion is a discussion which refers to several other Nebraska cases. We quote from page 822 of the Nebraska Reports as follows: " 'There is no doubt of the right of a plaintiff to maintain an action against two or more parties for conspiracy to do and actually doing some unlawful act to his damage; but the courts, so far as we are aware, are unanimous in holding that confederation and conspiracy are not actionable, unless something in pursuance of the common plan is actually done, and the thing done results in injury to the plaintiff, and the facts constituting this injury, and the damage resulting therefrom, must be alleged.' *Commercial Union Assurance Co. v. Shoemaker*, 63 Neb. 173. 'And in the next place the party must have been misled to his prejudice or injury; for courts of equity

do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff.' *Jakway v. Proudfit,* 76 Neb. 62, quoting from 1 Story, Equity Jurisprudence (13th ed.) sec. 203. The plaintiff having failed to plead facts showing that she suffered a damage because of the alleged fraudulent acts of the defendants, the demurrer was properly sustained as to that theory."

In *Dalheimer v. Lucia,* 50 N. Dak. 78, it is held: "One who is defrauded by a false statement which is made to induce and does induce the execution of a contract, has the choice of remedies: (1) To affirm the contract and take its benefits, so far as obtainable, and recover any damages sustained by the false statement; or (2) to rescind the contract and recover any moneys paid or property delivered under it."

In *Warne v. Finseth,* 50 N. Dak. 347, it is held: "Where the defrauded party affirms the transaction and brings an action to recover damages for the deception practiced upon him in inducing him to purchase the property, the measure of his damages, in the absence of a claim for special or exemplary damages, is the difference in value between what was received and what would have been received had the representations been true."

To the same effect are *Sloman v. Allen,* 252 Mich. 578; *Speath v. Merchants Life Ins. Co.,* 245 Mich. 100; *Donovan v. Curts,* 245 Mich. 348; *Cole v. Oatman,* 234 Mich. 128; *Timmerman v. Gurnsey,* 206 Ia. 35; *Walnut State Bank v. Mueller,* 202 Ia. 961; *Boysen v. Petersen,* 203 Ia. 1073; *Mueller v. Michels,* 184 Wis. 324.

It is quite apparent from these citations that the court did not err in placing the burden upon the defendant to establish the amount of his damages in case the jury found that he was defrauded. He was in no different

position as to proof on this element of his case than if he had been plaintiff. In such case the amount of his recovery would be the amount of damages he proved, and likewise here the amount of his counterclaim or defense is the amount of damages he proves. There was, however, a direct conflict in the evidence respecting the fraudulent representations and it is quite apparent from the verdict that the jury found that there was no fraud. The seller not only denied that the alleged fraudulent representation was made, but the circumstances indicate either that it was not made or that defendant did not reply upon it. The contract for the sale of the one-third interest was in December, 1930, yet long after that time defendant continued to pay the consideration therefor. It is evident that, if the jury believed there had been fraud, they would have found for the defendant, since the only evidence in the record pertaining to the value of the patent right is that it was worthless.

Appellant cites cases to the effect that damages need not be proved; but these evidently are not cases where the contract was affirmed and the defendant in a suit on the contract or on an obligation arising out of the contract was setting up fraud as a defense. In cases where there has not been a rescission, the remedy is damages for the fraud; the burden in such cases is on the person alleging fraud to prove both the fraud and the amount of his damages, and the measure thereof is the difference between the article or thing if it had been as represented and its actual value. Naturally if the contract had been rescinded, and not affirmed, as it was in this case, proof of fraud justifying the rescission might be a complete defense without proof of the amount of damages.

A careful examination of the record does not reveal any prejudicial error, and the judgment of the district court is therefore

AFFIRMED.

THOMAS W. BARGER, APPELLANT, V. CITY OF TEKAMAH, APPELLEE.

FILED APRIL 23, 1935. No. 29239.

Equity: LACHES. " 'Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.' *Abraham v. Ordway*, 158 U. S. 416." *Severson v. McKenzie*, 122 Neb. 827.

APPEAL from the district court for Burt county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Maher & Carrigan, for appellant.

Orville Chatt and *Keith Hopewell, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

LIGHTNER, District Judge.

Suit by plaintiff for an injunction to prevent the city from maintaining a pump-house, pumps, machinery and structures in the street adjacent to plaintiff's real estate. The finding and judgment were for defendant and plaintiff appeals. Plaintiff purchased a block of unimproved real estate in Tekamah, August 27, 1930, for $800, and in December, 1932, brought this suit.

It appears from the evidence that the block now owned by plaintiff is half a block from the north boundary of the city of Tekamah and a number of blocks from the business district and had a value at the time of trial of from $600 to $1,000; that, when plaintiff purchased it, it was wholly unimproved but the plaintiff has since placed a small frame structure upon it 30 by 20 feet in size, referred to in the pleadings and evidence as a shanty or shack; that the west part of the block slopes steeply to the east and the east part is flat; that this block has never been used for residential or business purposes, but has been farmed and pastured, and that at times the

east side has been banked up to form a skating place and a place from which to cut ice; that the block is not desirable residence property and is far away from the business part of town; that forty or more years ago the city began using the streets adjacent to the southwest corner of the block for wells, a pump-house and other machinery in connection with the water service of the city; that these pumps are operated by electric machinery which causes some vibration and noise; that a tornado or cyclone in May, 1930, blew down the original pump-house, and that a new pump-house much smaller in dimensions was constructed on the old site, and that part of the old foundation, or at least the outlines of it, still exist; that the cost of moving the city property from its present location to another would be in the neighborhood of $20,000; that there is very little travel on the streets adjacent to the southwest corner of this block, and that there is ample room for such travel as there is, and sufficient space for plaintiff's egress and ingress; that the structures in question interfere in only a minor degree with plaintiff's view and still less with his light and air; that the value of plaintiff's property is depreciated very little, if any, by the structures in question; that the vibration and noise complained of are slight and are not noticed by others who live in about the same locality. While some of these propositions were controverted, especially as to whether the existence of the structures depreciated the value of plaintiff's property, the weight of evidence sustains all the foregoing.

There was evidence to the effect that persons traveling on the street west of plaintiff's block would not notice the structures in question; that plaintiff's shack or shanty above referred to also extends out into the street, and that an outhouse 4 by 4 used in connection with it is entirely in the street. Thirteenth street east of plaintiff's block is a well-traveled, paved street or highway, but the other streets surrounding his block are not extensively used, since there are very few people living in the locality west and north of plaintiff's block.

Plaintiff sets forth a great many propositions of law in his brief to the effect that it is the duty of the city to keep the streets, public highways and alleys open and in repair and free from nuisance, and that any obstruction in the street is a nuisance, and that prescription or lapse of time cannot be relied on to establish a right to maintain a public nuisance. There is no doubt respecting the soundness of these propositions of law in a situation to which they apply. The question here, however, is if plaintiff and his predecessors in title can do nothing for over forty years, during which time the city has established these structures, can he then resort to the extraordinary remedy of injunction to cause their removal at a large cost to the city while the injury to the plaintiff is comparatively small? Plaintiff cites section 17-507, Comp. St. 1929, to the effect that the city council shall cause the streets and alleys to be kept open and in repair and free from nuisance. The same governing authorities may vacate any street, avenue, or alleys. Comp. St. 1929, secs. 17-456, 17-457; *Lee v. City of McCook*, 82 Neb. 26; *Enders v. Friday*, 78 Neb. 510. While the city acted irregularly in thus devoting the public streets to a purpose foreign to their original use, it has been in the continuous, open and notorious possession of the part of the streets now referred to for over forty years. In *Severson v. McKenzie*, 122 Neb. 827, it was said by Chief Justice Goss: "We call attention to another rule which we think may well be invoked. 'Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations.' *Hawley v. Von Lanken*, 75 Neb. 597. This followed the opinion of the supreme court, by Mr. Justice Harlan, in *Abraham v. Ordway*, 158 U. S. 416, in which he said: 'Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.'"

The author of 3 Dillon, Municipal Corporations (5th ed.) sec. 1194, after reviewing the authorities, comes to the conclusions hereinafter stated. He refers to the case where a third person is asserting an interest in a public street, but we do not believe the rule would be less favorable to the municipality itself. The municipality itself has no right to appropriate the street for any use entirely inconsistent with street purposes. 44 C. J. 938, and many authorities cited in the notes. But, as appears from the quotation from Dillon, the courts at times recognize an estoppel *in pais* in favor of third persons, and the reasons given in Dillon apply, it seems to us, in favor of the municipality. The quotation referred to from section 1194, Dillon, is as follows: "A (municipal) corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require."

In a note which accompanies the text is a further discussion as follows: "The principle of estoppel *in pais* has been applied to exceptional cases where the elements calling for its exercise appear to have been an abandonment of the public use for the prescriptive period, inclos-

ure and expensive improvements, such as large and costly buildings, or acts of the municipality inducing the abutter to believe that there is no longer any street, and the expenditure of money in reliance upon the acts of the municipality. The absolute *bona fides* of the abutter or adverse possessor is a most important factor where an estoppel *in pais* is claimed. The acts relied on must be of such character as to amount to a fraud, if the city were permitted to claim otherwise."

The judgment of the district court is right and is

AFFIRMED.

FRANK J. TAYLOR, ADMINISTRATOR, APPELLANT, V. JACK KOENIGSTEIN, APPELLEE.

FILED APRIL 26, 1935. No. 29162.

1. **Contracts:** VALIDITY: SPENDTHRIFTS. There is no incapacity of spendthrifts at common law in Nebraska, nor do our statutes so far liken them to insane persons as to create an incapacity apart from guardianship.
2. ———: ———: DRUNKENNESS. To avoid a contract or transaction on the ground of drunkenness, it is not sufficient that the party was under undue excitement from liquor. It must arise to that degree which may be called excessive drunkenness, where a party is so far deprived of his reason and understanding as to render him incapable of understanding the character and consequences of his act.
3. ———: RESCISSION. To avoid a contract on the ground of excessive intoxication, one must rescind the contract within a reasonable time after recovering his senses, or, if he has received no money or property in consideration therefor, he must, within a reasonable time, disclaim liability thereon.
4. ———: VALIDITY. Drunkenness or insanity that affects the validity of a contract must be of the time at which the transaction occurs, regardless of previous insanity or incapacity. Thus, a contract is binding if entered into in a lucid interval.
5. **Bailment:** LIABILITY OF BAILOR. Where a gratuitous bailee received and held certificates of deposit for moneys belonging to an alleged spendthrift and incompetent, and thereafter,

in strict compliance with the engagements pursuant to which such certificates were originally received, delivered the same to the bank issuing them as deposits to the credit of such alleged incompetent, when and as requested by him, such bailee is not liable to the administrator of the bailor because of this transaction, the appointment of a guardian for such alleged incompetent not having been made at the time any of such certificates were so deposited.

6. **Evidence** in the record examined, and *held* to sustain the findings and judgment of the trial court.

APPEAL from the district court for Madison county: MARK J. RYAN, JUDGE. *Affirmed.*

Webb Rice and *Taylor & Spikes*, for appellant.

Kelsey & Kelsey, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ.

PER CURIAM.

This action was originally brought after the death of Edmund H. Sattler by the duly appointed administrator of his estate against Jack Koenigstein as sole defendant. Two causes of action are set forth in the petition filed. In both, Sattler, the decedent, is alleged to be an incompetent, in the following language: "That said Sattler was an incorrigible spendthrift, and at the time of receiving said cash (April 11 to 15, 1930), and for several years immediately prior thereto had been a habitual drunkard and dipsomaniac, and was wholly incompetent to care for, conserve and manage said estate."

The first cause of action was based upon an alleged overcharge for services as attorney at law in the sum of $1,142.75 made by Boyle & Koenigstein, a firm of attorneys of which the defendant was a member.

The second cause of action set forth that by reason of certain acts of commission and omission on the part of Koenigstein, stated at length, the decedent sustained a loss of $5,000.

Answer was filed by the defendant, taking issue with

the allegations of plaintiff's petition, but admitting certain facts. To this answer plaintiff replied.

On these issues a jury was impaneled and sworn, and plaintiff introduced his evidence in chief. Thereupon the court sustained defendant's motion that the jury be discharged and the action proceed as one in equity.

At the close of all the evidence the district court entered a general finding in favor of defendant and against plaintiff, and dismissed the action.

The cause is now presented on appeal for trial *de novo* by plaintiff, appellant, on the theory that it is a cause of action to charge defendant Koenigstein as guardian *de son tort* or trustee *in invitum* with approximately $6,000 of decedent's money, of which the defendant had charge as a voluntary trustee or guardian for said decedent, shortly preceding the decedent's death in June, 1930.

A careful reading of the record sustains the conclusion that plaintiff's decedent, in his lifetime, was properly described as a "spendthrift." For the purposes of this opinion, this term will be defined as "One who spends money profusely or improvidently; a prodigal; one who lavishes or wastes his estate." Webster's New International Dictionary (2d ed.) Unabridged.

In 1866 there was duly adopted by the territorial legislature an act entitled "An act for revising, amending, consolidating and reenacting the Civil and Criminal Codes, and the Laws of a general nature, of the territory of Nebraska." Rev. St. 1866, p. 1. Section 40, ch. 23 of this enactment (now Comp. St. 1929, sec. 38-301) provided: "The word 'spendthrift' in all its provisions relating to guardians and wards, contained in this or any other statute, is intended to include every person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery."

The characteristics of spendthrifts have occupied the attention of the lawgivers and judges from the earliest time. Thus, Blackstone says: "In this case of idiots and luna-

tics, the civil law agrees with ours, by assigning them tutors to protect their persons, and curators to manage their estates. But, in another instance, the Roman law goes much beyond the English. For, if a man, by notorious prodigality, was in danger of wasting his estate, he was looked upon as *non compos,* and committed to the care of curators or tutors by the prætor. And, by the laws of Solon, such prodigals were branded with perpetual infamy. But with us, when a man on an inquest of idiocy hath been returned an unthrift, and not an idiot, no further proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. *'Sic utere tuo, ut alienum non lædas,'* is the only restriction our laws have given with regard to economical prudence. And the frequent circulation and transfer of lands, and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed Constitution in its due health and vigor." 1 Cooley's Blackstone (3d ed.) *306.

Without approval of the reasons so assigned by Blackstone, it may be said that this was in truth the common law which the colonists brought with them and which we have under limitations stated in the act adopted. Comp. St. 1929, sec. 49-101.

However, to remedy this situation, and to provide a measure of protection to the spendthrifts and their dependents, remedial legislation was enacted in the several colonies and their successor states as early as 1783. Massachusetts adopted legislation in purpose and effect quite similar to the provisions of chapter 23 of the territorial Laws of Nebraska, passed and approved in 1866, and which now appear as sections 38-301 to 38-306, inclusive, Comp. St. 1929.

In passing upon Massachusetts acts, its courts, long prior to the adoption of similar legislation here, uniformly held that at common law there is no incapacity of spendthrifts, and in order to secure the benefits of these remedial enactments, their terms and conditions must be complied with. See *Smith v. Spooner,* 3 Pick. (Mass.) 229; *Manson v. Felton,* 13 Pick. (Mass.) 206; *O'Donnell v. Smith,* 142 Mass. 505.

Thus, in discussing this point the supreme court of Massachusetts, in *Manson v. Felton, supra,* says in part: "Lunacy or distraction, independent of any positive enactment, is itself a disability to contract, arising from want of capacity. In the case of a spendthrift there is no natural or mental incapacity, and, therefore, the incapacity by force of the statute itself, takes effect only from the appointment of the guardian, except the precise limited incapacity to make conveyances of property after a complaint filed and before proceedings upon it, declared by St. 1818, c. 60. * * * Now the invalidity of all grants and transfers of property by a lunatic or idiot does not arise from the appointment of a guardian, which supersedes the power of the owner, but from the natural incapacity, arising from want of mental power to contract; and this, not by force of the statute, but by well-known rules of the common law."

In *O'Donnell v. Smith, supra,* Holmes, J., (later of the supreme court of the United States), in delivering the opinion of the court, not only affirms the proposition that "there is no incapacity of spendthrifts at common law," but approves the doctrine that the terms of the controlling legislation must all be substantially complied with before the legal incapacity of the spendthrift is established. Further, in construing a statute, "which makes such appointment (of a guardian) a condition to its avoidance of transfers made by the spendthrift," Holmes, J., in effect, held that a judicial determination of this fact by a court of competent jurisdiction in a proper proceeding then pending before it, and the appointment by such court

of a guardian for the adjudicated spendthrift, but who died without qualifying or entering upon his duties, and where for nine years following such death no further steps were taken, was wholly insufficient to affect the legality of, or nullify, the transactions of such spendthrift.

So, it appears practically unquestioned in the authorities that "there is no incapacity of spendthrifts at common law; nor do the statutes so far liken them to insane persons as to create an incapacity apart from guardianship." 58 C. J. 1295.

A consideration of this principle is invoked by the evidence presented by the plaintiff in this case, and in particular the following: Exhibit 6, received in evidence upon offer by plaintiff, is a warrant of commitment in due form, issued by the board of insanity of Madison county, under date of June 15, 1929. It recites the making of an "investigation in due form of law," and that Edmund H. Sattler is found "to be a dipsomaniac and a fit subject for custody and treatment in the hospital."

Exhibit 7 discloses that Edmund H. Sattler was discharged from such commitment on July 13, 1929.

Exhibits 29 and 29a were offered in evidence and received over objections of defendant. Exhibit 29 is a warrant of commitment issued by the board of insanity of Holt county, Nebraska, in which it is recited that, "upon investigation in due form of law, * * * on April 22, 1930," the board "find Edmund Sattler to be an inebriate and addicted to excessive use of alcoholic liquor." Exhibit 29a is a certified copy of the record of the board of insanity of Holt county, Nebraska, of the hearing had before it on April 22, 1930, pursuant to which exhibit 29 was issued, and wherein Edmund Sattler was charged with insanity; that Sattler was represented by attorney; that Sattler was examined by the examining physician of the board, and the testimony of witnesses was taken; and the consideration of such evidence resulted in a finding "that there was insufficient evidence upon which to base a finding of insanity, but found, under the evidence,

that the said Edmund Sattler is an inebriate and a person addicted to the excessive use of alcoholic liquor."

As to the terms employed, Webster's New International Dictionary (2d ed.) Unabridged, defines "dipsomaniac" as "one affected with dipsomania," and the latter term as "a morbid and uncontrollable craving (often periodic) for drink, esp. alcoholic liquors; also, improperly, acute and chronic alcoholism." The term "inebriate" is likewise defined as "one who is drunk or intoxicated; esp. a habitual drunkard."

These proceedings, above referred to, were had under sections 83-742 to 83-748, Comp. St. 1929. These sections were enacted in 1905 as chapter 82 of the Session Laws of that year, under a title, "A bill for an act providing for the examination of dipsomaniacs, inebriates, * * * for the detention, care and treatment of such persons," etc. The act in terms was restricted to the person of those within its provisions, and did not assume to in any manner affect their property rights or relations.

Without determining the technical objection to the admission of these exhibits, it is obvious that, so far as concerns consideration in connection with the charge of being an "incorrigible spendthrift," they are wholly ineffective "to create an incapacity apart from guardianship." Considered in connection with the charge of being a habitual drunkard and dipsomaniac, they could in no manner affect or modify the long-established rule of this court: "To avoid a contract on the ground of drunkenness, it is not sufficient that the party was under undue excitement from liquor. It must arise to that degree which may be called excessive drunkenness, where a party is so far deprived of his reason and understanding as to render him incapable of understanding the character and consequence of his act." *Case Threshing Machine Co. v. Meyers*, 78 Neb. 685.

Further, "To avoid a contract on the ground of excessive intoxication, one must rescind the contract within a reasonable time after recovering his senses, or, if he has

received no money or property as a consideration therefor, he must, within a reasonable time, disclaim liability thereon." *Case Threshing Machine Co. v. Meyers, supra.*

See, also, *Johnson v. Phifer,* 6 Neb. 401; *Hauber v. Leibold,* 76 Neb. 706; *Benton v. Sikyta,* 84 Neb. 808; *Carroll v. Polfus,* 98 Neb. 657.

If the facts disclosed by the evidence in the instant case are sufficient to, at times, establish a condition of insanity, the test of mental capacity to contract is whether Sattler possessed sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he was engaged; and, in order to avoid a contract, it must not only appear that he was of unsound mind when it was made, but also that this unsoundness was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract. See 32 C. J. 727.

In addition to this, the drunkenness or insanity that affects the validity of a contract must be of the time at which the transaction occurs, regardless of previous insanity or incapacity. Thus, a contract is binding if it is entered into in a lucid interval. See 32 C. J. 728.

As to the mental condition of Edmund H. Sattler, generally, the record indicates that he carried on a continued series of business transactions prior to the ones in suit, and even before his release from testamentary guardianship. These include the purchase and operation of automobiles, the purchasing and financing of a truck, the mortgaging of a part of his real estate to secure a loan of $5,000, a sale of his interest in a part of his inherited lands for a like amount, the sale of the cattle and equipment on a ranch in Holt county, Nebraska, the purchase and operation of a soft drink business at Pierce, Nebraska. Though most, if not all, of these transactions occurred while he was still under guardianship, and after he was married, the sufficiency of his mental powers in relation to the transactions referred to appears to have never been seriously challenged, either by his guardian,

his wife, or his friends. Yet, he was, during this period, frequently intoxicated, and when he had reached a certain degree of intoxication he was abusive, violent, uncontrollable, and maliciously destructive. As examples of this, it appears that he borrowed money and purchased a soft drink business at Pierce, Nebraska, and then later, in a condition of maudlin intoxication, he broke up and destroyed fixtures and stock, and ruined his enterprise. Again, he sold certain interests in land and invested the proceeds in a bootlegging venture. For this purpose he purchased two large automobiles, conducted them to Canada, secured a cargo of alcoholic liquors, successfully made the return trip and brought his contraband liquors into Holt or Pierce counties where they were "cached." Then he went on a "spree," and, in a drunken condition, drove one of the automobiles into O'Neill, Nebraska, with a cargo of illicit liquors aboard, where unknown parties, by force or theft, removed these liquors from his possession, and they were never recovered. The evidence indicates that a portion of the liquors that were "cached" were also stolen. The amount of the proceeds of liquors sold is not shown by the record. But it does appear that about this time, while still intoxicated, in drunken, uncontrollable fury, Sattler broke up and greatly damaged the two motor vehicles used in the bootlegging ventures, in the presence of his wife and relatives. Still, so far as is shown by the present record, he was not prosecuted for this unlawful transaction, and the proximate cause of his conceded losses was his habit of intoxication. The record contains evidence of witnesses to the effect that Sattler was an incompetent, but, with one exception, this opinion is based wholly on his habits of intemperance, and his qualities as a spendthrift. On the other hand, there is substantial evidence in the record that he was of normal mind. This, of course, relates to periods when he was not under the influence of intoxicating liquors. It is obvious that on this basis, to a degree, this apparently conflicting evidence may be harmonized. It is certain

that Sattler was a habitual drunkard and frequently became intoxicated to such a degree that he was, during the continuance thereof, wholly irresponsible. It is equally well established that there were other periods (when he was not under the influence of liquor) when he possessed and exhibited powers of mind ample to understand in a reasonable manner the nature and effect of the act or transaction in which he was then engaged. Therefore, it is obvious that the validity of each of the transactions in suit must be determined by the actual condition of his mind at the time they occurred.

In the light of the controlling principles above set out, and the conclusions of fact thus arrived at, an examination of the record discloses that, by the terms of his father's will, Sattler and his sister were placed under a testamentary guardianship until he arrived at the age of 26 years; that after he attained the age of 21 years, as construed by mutual consent of guardian and ward, the guardian's powers were not extended to his person, but were limited to his estate. This guardian was by order of the county court of Madison county, Nebraska, duly discharged on the 8th day of April, 1930, which order also directed a payment of $2,828.10 to be made by the guardian to Edmund H. Sattler. On April 8, 1930, the final report of the executor of the estate of Anna Sattler, deceased, was approved by the county court of Madison county, and such executor was by that court directed to pay to Edmund H. Sattler the sum of $14,189.55. The records of the county court disclose that the defendant, Jack Koenigstein, appeared as an attorney for Edmund H. Sattler in the hearings had upon the guardian's final report, and also in the hearing upon the final report of the executor.

On April 11, 1930, additional claims or credits of claims in favor of the executor, which had not been included in his final report, and which are itemized in the record and aggregate $2,014.20, were presented to and approved by Edmund H. Sattler, represented by his attorneys Boyle

& Koenigstein. Thereupon the executor deducted this sum of $2,014.20, as agreed upon, from the amount adjudged payable to Edmund H. Sattler. On that date, in settlement of the amounts due Sattler under the two decrees of the county court, two checks were drawn on the Norfolk National Bank, payable to Sattler's order, one of them for $2,328.10 drawn by his guardian, and the other for $12,175.35 drawn by the executor of his mother's estate. These checks were received by defendant Koenigstein, as one of the firm of Boyle & Koenigstein, attorneys, and as representative of Edmund H. Sattler, and in his presence, at the close of this negotiation. There is no evidence in the record of any intoxication of Sattler at the time of this transaction.

The record also establishes beyond dispute the existence of the following facts and circumstances, prior to the creation of the relation of attorney and client between Boyle & Koenigstein and Sattler:

On attaining his majority Sattler was desirous of terminating the powers of his testamentary guardian. For this purpose he commenced an action in the county court of Madison county. Neither Boyle nor Koenigstein was employed in this case. It appears that this litigation was ultimately settled and the testamentary guardian continued. A certain sum of money was advanced to Sattler in consideration of the settlement, and the compensation of his then attorney was provided for by the guardian.

The testimony of plaintiff's witness, Clara Patterson, who was Sattler's wife and had remarried after his death, is that when the time was approaching when, under the terms of his father's will, the testamentary guardianship would terminate, Sattler had a conversation with his guardian. As to what was said by the guardian the record before us does not indicate, but the evidence clearly establishes that the effect of these statements was to create in the mind of Sattler a decided belief that at the end of the period of testamentary guardianship an attempt would be made by his guardian to prevent him from

receiving his inheritance. In this connection the guardian admits that Sattler's competency was a subject of discussion between himself and the county judge at the time of rendering the final report. Also, there were several talks between the witness, Clara Patterson, and her husband at this time, on the subject of the continuance of the guardianship "after Mr. Pasewalk's time was up." This proposition, at all times, Sattler resented.

This witness, Clara Patterson, further testifies: "Mother and Dad said they were going to see that Edmund didn't get this money that was coming to him when he arrived at the age of 26 years, but he said if they did he was going to fix them." With this information in his possession, about three or four months prior to April 16, 1930, it appears that Edmund H. Sattler went to Norfolk, Nebraska, and called at the law office of Boyle & Koenigstein. He was received by Mr. Boyle of that firm in Boyle's private room. In the conversation that followed he employed the firm at an agreed compensation of $2,500 to secure for him his inheritance at the termination of the testamentary guardianship, as provided by his father's will. The amount involved exceeded $22,000. It may be said in passing that there is no evidence in the record attacking the reasonableness of the amount agreed upon, in view of this situation then believed to exist by the parties to the contract. After these arrangements had been made there was further talk between Mr. Boyle, Mr. Sattler, and Mr. Koenigstein. The evidence further clearly establishes that this employment marked the commencement of confidential relations between Sattler and Koenigstein.

However, neither Sattler's father-in-law nor mother-in-law had carried out their declared intention, and his wife had done nothing. The guardian had finally offered no serious objection. When Koenigstein received the checks which represented his client's inheritance, the substantial object of the employment of Koenigstein's law firm had been accomplished, but, in a large measure, the con-

test which had been reasonably expected and on the basis of which the services of this law firm had been contracted for had not materialized.

Mr. Boyle, who had been called away from Norfolk, returned about April 15, 1930, and on the next day, April 16, it was agreed by all parties to the engagement that the attorneys fees stipulated in the contract of employment, in consideration of subsequent developments, should be reduced from $2,500 to 5 per cent. of the amount recovered. The undisputed evidence in the record establishes that on the day of this transaction Sattler was not intoxicated, and was of sane mind. On this basis, it was agreed between the parties that the attorney fees amounted to $1,142.75, and a check for that amount in favor of Boyle & Koenigstein was made and delivered by Sattler. Thereupon Sattler received from his attorneys the entire amount of the recovery from the guardian and executor then remaining unpaid. The record further fails to disclose that Sattler ever questioned the validity of this settlement or the reasonableness of the attorney fees as finally agreed upon and paid. Also, the record contains no evidence which, in effect, tends to establish that the amount received by this law firm was, in view of their engagements and the results secured, unreasonable in amount.

Upon receiving this payment from his attorneys, Sattler at once sought to deposit the same in the Security State Bank of Norfolk. The officers of this institution wanted the deposit, but Sattler insisted upon some arrangement that would secure and protect his funds against the demands of his creditors. After some negotiations, by agreement of the interested parties, defendant Koenigstein was called up by telephone from the bank, and he came to the conference. There he finally acceded to the request, in which Sattler joined, which, in substance, was that Sattler would deposit all his present funds in the Security State Bank of Norfolk, and that this bank would issue to defendant Koenigstein certain nonnegotiable cer-

tificates of deposit, aggregating in amount the deposit thus made by Sattler, which Koenigstein agreed to hold, subject to Sattler's disposition, and particularly to deposit them to the credit of Sattler's checking account, when and as requested by Sattler. It appears that the money was thereupon deposited by Sattler, received by the bank, and the certificates of deposit issued and received by Koenigstein, who thereupon delivered to Sattler a signed memorandum or receipt, setting forth the substance of the transaction.

The affirmative evidence in the record is to the effect that at the time of this transaction Sattler was not intoxicated and was of normal mind, and his subsequent conduct amply sustains the deduction that he then knew and realized the nature of the transaction entered upon.

Subsequently, from time to time, these certificates were, at Sattler's demand, deposited to his credit in the Security State Bank until all of them received by Koenigstein had been redeposited as required by the agreement, and these proceeds had been paid out by the bank on the personal checks of Sattler. By necessary implication, the inference from the facts in the record is that Koenigstein in this transaction neither retained nor used any of the moneys evidenced by the certificates of deposit received by him, nor any interest accruing thereon, nor was any compensation given him for his services. In passing, it may be said that the ethics of this transaction is not here for consideration; defendant Koenigstein predicates no demand for affirmative relief thereon; and in the present proceeding the rights of creditors, prejudiced by concealment, do not appear.

It is also fairly disclosed by the record before us that except as to the relation of attorney and client, as already set out, no confidential relations existed between Koenigstein and Sattler; that after this agreement of April 16, 1930, Koenigstein paid out no money for Sattler except to make these deposits in the Security State Bank when and as directed; that he was never advised with or con-

sulted by Sattler on the subject of investments or business generally, and never sought nor exercised any control over Sattler's mind, his business transactions, or his property. This transaction, as was also the previous one, was entirely closed and terminated by Sattler prior to his death, and was by him never questioned or disaffirmed.

We have carefully examined the purchase by Sattler of the moving picture establishment at St. Paul, as disclosed by the evidence before us, and any participation therein by the defendant Koenigstein is negatived; and even knowledge on his part of facts in connection therewith sufficient to challenge his attention thereto is not established by the evidence.

In a case quite similar to the instant one, so far as controlling facts and contentions as to mental capacity are concerned, the supreme court of Iowa announced the following rule: "Where one who held securities belonging to another, adjudged an habitual drunkard, delivered them to him after the commencement of proceedings for the appointment of a guardian, he could not be held liable for the value of the securities by an heir of the incompetent, after his death; the appointment of a guardian not having been made at the time of the delivery." *McCoy v. Nuese,* 154 Ia. 563.

The reasoning of the Iowa court, set forth in the opinion referred to, as applied to the facts established by preponderating evidence in the instant case, is strikingly persuasive, and is adopted here.

It, therefore, follows that we determine on a hearing *de novo* that the evidence in the record before us amply sustains the findings and judgment of the trial court, and the same are

AFFIRMED.

JO JOSEPH V. STATE OF NEBRASKA.

FILED APRIL 26, 1935. No. 28734.

1. **Criminal Law: TRIAL: INSTRUCTIONS.** An instruction correctly states the rule which informs the jury that they may disregard the testimony of any witness who they believe from the evidence has wilfully testified falsely.
2. ———: ———: ———. Where the condition of the testimony is such as to justify an instruction based upon the legal maxim, *falsus in uno, falsus in omnibus,* and a proper instruction is requested, it is error for the court to refuse to give it.
3. ———: ———: ———. Where there is testimony from which a jury could find that a witness has wilfully testified falsely on a material issue in the case, it is error to refuse a requested instruction that, if they so find, testimony of such witness on other material matters may be disregarded.
4. ———: ———: ———. It is the duty of defendant complaining of trial court's refusal to give instruction based on maxim *falsus in uno, falsus in omnibus,* to indicate testimony requiring it.
5. **Statutes: TITLE.** A statute must not be broader than its title. Const., art. III, sec. 14.
6. ———: ———. Title of act reading "to provide punishment for one who makes statements or representations with intent to defraud" is not broad enough to include imposition of penalty upon one who does not know that the statements and representations are false, but by the exercise of reasonable diligence could have known, or who had reasonable ground to believe that any material representation is false.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Leonard A. Flansburg, O'Sullivan & Southard and *Philip Birnbaum,* for plaintiff in error.

Paul F. Good, Attorney General, and *William H. Wright, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY and PAINE, JJ.

DAY, J.

The plaintiff in error was indicted by a Douglas county grand jury with seventy other defendants charging them with a conspiracy to commit a felony (Comp. St. 1929, sec. 28-301) in violation of section 28-1217, Comp. St. 1929, by making false statements of the value of certificates of stock. The plaintiff in error, hereinafter for convenience called defendant, was convicted upon a separate trial continuing from January 9 to January 24, 1934.

The trial court refused to give an instruction requested by the defendant as follows: "If you believe from the evidence that any witness who testified in this case has wilfully testified falsely to any material fact in said case, then you are at liberty to entirely disregard all of the testimony of any such witness." It is a time-honored maxim of the law that, in weighing testimony, a jury should consider, where a witness wilfully testified falsely as to one matter, that it impairs the credibility of his testimony upon other matters.

In *Titterington v. State,* 75 Neb. 153, it was held: "An instruction which informs the jury that, if they believe that a witness has wilfully and corruptly testified falsely as to any material fact, they are at liberty to reject all or any portion of the testimony of such witness, correctly states the rule to be applied to such cases."

This rule is quoted with approval in *Christiancy v. State,* 106 Neb. 822, which opinion also quotes from Starkie on Evidence (9th Am. ed.) p. 766, as follows: "As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, *'falsus in uno, falsus in omnibus.'* The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according

to the result his testimony is to be credited or rejected."

It is the well-established law of this jurisdiction that the defendant in a criminal case is entitled under proper circumstances to have the requested instruction given as a correct standard by which the jury may pass upon the credibility of a witness. An instruction correctly states the rule which informs the jury that they may disregard the testimony of any witness who they believe from the evidence has wilfully testified falsely. Jones, Commentaries on Evidence, 2473; *Atkins v. Gladwish,* 27 Neb. 841; *Johnson v. State,* 34 Neb. 257. Many other Nebraska cases are found in the digest to the same effect. The instruction requested by the defendant in the instant case was a proper and correct statement of the law. Was the refusal of the trial court to instruct the jury as requested erroneous? Referring again to the *Titterington* case, *supra,* it held: "Where, in a proper case, such an instruction is tendered, it is error for the court to refuse to give it because it does not contain the qualifying words 'unless corroborated by other competent proof.'" See, also, *Markiewicz v. State,* 109 Neb. 514; *Barber v. State,* 75 Neb. 543; *State v. Wilcox,* 48 S. Dak. 289.

Where the condition of the testimony is such as justifies an instruction based upon the legal maxim *falsus in uno, falsus in omnibus,* and a proper instruction is requested, it is error for the court to refuse to give it.

Is the testimony in the case at bar such as required the trial court to give the requested instruction? It is true that there was a direct and serious conflict in the the evidence. But merely a conflict in the evidence is not sufficient to require the giving of the instruction. *Markiewicz v. State,* 109 Neb. 514; *Drawbridge v. State,* 115 Neb. 535. There must be evidence tending to prove that a witness wilfully testified falsely upon a material matter before the court is required to instruct on the principle of *falsus in uno, falsus in omnibus.* The evidence must be sufficient to justify the jury in reaching the conclusion that the witness wilfully testified falsely

on a material matter. *Miller v. State,* 139 Wis. 57; *Judge v. Jordan,* 81 Ia. 519.

Where there is testimony from which a jury could find that a witness has wilfully testified falsely on a material issue in the case, it is error to refuse a requested instruction that, if they so find, testimony of such witness on other material matters may be disregarded.

It is the duty of defendant complaining of trial court's refusal to give instruction based on maxim *falsus in uno, falsus in omnibus,* to indicate testimony requiring it. The defendant relies upon the testimony of Stella Lynch, a witness for the state, as being sufficient to require the court to give the requested instruction. The witness was arrested when the police raided the office of the corporation of which defendant was an officer and was indicted with defendant. Before this case was tried, the criminal charge against her was dismissed. Since the preliminary examination, she was employed by the county attorney. She testified that the corporate record and minute book was known to her, because it had been kept in the offices of the National Investors in the Union State Bank Building, and she identified signatures in the same. When it was developed on her cross-examination that the book was not kept in the office, she made evasive answers and admitted she did not know where it was kept. This exhibit was admitted over defendant's objection and without her testimony. The identification was insufficient. She further testified that one of the alleged conspirators, L. Stern, was present when a notation was made on August 13. On cross-examination, she admitted she was not employed by the company on that date and did not witness the signing of papers in the book.

The incorporation of the company claimed by the state to be a part of the conspiracy to commit a felony and the record of defendant's attendance at corporation meetings were material matters. The record had been excluded by the court because of insufficient foundation, but was admitted solely upon the identification of this witness.

There was testimony directly and definitely in conflict, but the admissions of the witness to the falsity of the testimony were such that the jury could have found that she wilfully testified falsely in this material matter.

She identified most of the 336 exhibits in this case which were vital to the prosecution. If she was not working there and did not see some of these exhibits, she was incompetent to identify them. And if the jury found that she wilfully testified falsely, they had a right to consider this in relation to her credibility on other material matters. It was not enough that the jury consider merely her interest in the prosecution, if such was apparent; the defendant was also entitled to the instruction requested.

Hugo Kvetensky, another witness, is indicated as giving testimony requiring the instruction. He testified that he signed an agreement to buy only 25 shares and was confronted with a signed order for 100 shares. He testified that a $1,000 street railway bond was taken by the salesman of the company, by making fraudulent representations, and then admitted he turned it in to pay for 100 shares. He testified he talked to Joseph in the company offices, but did not identify him. His testimony was refuted by documentary evidence, some of it produced by himself, and in addition was denied by other witnesses. This testimony is sufficient to justify the jury in believing that the witness testified falsely. It is not for this court to determine whether the witness wilfully testified falsely; the credibility of witnesses is for the jury, under proper instructions. An examination of the record reveals that there is testimony which justified the jury in finding that a witness wilfully testified falsely on a material issue in the case, and it was error to refuse a requested instruction that, if they so found, they might disregard the testimony of such a witness on other material matters.

This case was prosecuted under section 28-301, Comp. St. 1929, which provides punishment for any two or more persons who conspire and do any act to effect the

object of the conspiracy. The felony which the defendant is charged with conspiring to commit is defined by section 28-1217, Comp. St. 1929, which is as follows:

"Any person who with intent to deceive, cheat or defraud, represents, makes, issues or publishes or causes to be represented, made, issued, or published, or who participates in the representation, making, issuance or publication of any oral or written statement, letter, representation, report or advertisement concerning the value or as to facts affecting the value of any certificate of stock, shares, treasury shares, bonds, debentures, certificates of participation, units, undivided interest, notes or other obligations or evidence of indebtedness, or of title which constitutes evidence of or is secured by title to, interest in, or lien upon any or all of the property or profits of the issuer, or any instrument issued evidencing or representing any right to participate or share in the profits or earnings or the distribution of assets of any business carried on for profit, or other instruments in the nature thereof by whatsoever name known or called, or undivided interests in the capital, property, assets, profits, or business of any person, corporation, partnership, joint stock company, declaration of trust association or other association or individual, whether evidenced by written or printed certificates or not, and who knows or through the exercise of reasonable diligence could have known, or who has reasonable ground to believe that any material representation, prediction or promise made in such statement, letter, representation, report or advertisement is false, shall be deemed guilty of a felony."

Under an indictment in a single count the defendant was charged with a conspiracy to violate this statute relating to false statements and advertisements as to the value of securities. The indictment was attacked all through the trial on the ground that section 28-1217, Comp. St. 1929, was void and unconstitutional. For the purpose of clarity, the essential parts of the statute for this opinion are stated briefly as follows: Any person

who with intent to deceive, cheat or defraud, represents, makes, issues or publishes any statement or representation concerning the value of any security, and (1) who knows, or (2) through the exercise of reasonable diligence could have known, or (3) has reasonable ground to believe that the statements or representations are false, shall be deemed guilty.

The statute under consideration prohibits certain acts when done with a certain intent. Statutes may and do wholly omit the element of intent from the essential elements of a statutory crime and the enactment is, of course, valid. However, this statute provides for intent. It states that a person who "with intent to deceive, cheat or defraud" makes false statements concerning the value of securities comes within the statute. The acts of making false statements are not prohibited unless made with intent to deceive, cheat or defraud. Even then they are not prohibited unless they are made by one who knows, or "through the exercise of reasonable diligence could have known," or "has reasonable ground to believe" that any "material representation * * * is false."

Thus the statute prohibits the making of a representation or statement concerning the value of securities only when made with the specific intent to deceive, cheat or defraud, and when such representations are made by a person who actually knows them to be false, or through the exercise of reasonable diligence could have known, or who has reasonable ground to believe them to be false. An act which is made criminal only when committed with a specific intent is not prohibited unless that intent actually exists in the mind of the perpetrator. This specific intent presupposes knowledge and cannot exist under a state of facts where there is absence of knowledge.

Intent is defined by Webster's New International Dictionary (2d ed.) as the "design or purpose to commit any wrongful act incidental to a crime."

"At common law a crime possessed the element of an

evil intention together with an unlawful action." 8 R. C. L. 60, sec. 11. Statutes may create crimes without making criminal intent an essential element of the crime. 16 C. J. 76. A familiar example is that of statutory rape, where intent is not an essential element of the crime. Intent is not required in the sense of being based on knowledge on the part of the defendant of the facts constituting the crime. Belief of defendant that the female was over the statutory age, even if founded upon her statement, does not exonerate. The physical act is forbidden by statute, regardless of knowledge or intent. Another familiar example of statutes constituting acts criminal without intent being an essential element are those prohibiting certain acts by bank officials in the operation of their bank.

But here we have a different type of statute which makes intent to defraud an essential element of the crime. Such intent requires knowledge. Now the intent required by this statute is one to cheat, deceive or defraud. This must mean that he wills to do the overt act for the purpose of cheating, deceiving or defrauding. But it further provides that, if the defendant, through the exercise of reasonable diligence, could have known or had reasonable grounds to believe the statement false but did not actually know it to be false, then it cannot be said that he had the knowledge essential to the existence of the specific intent to deceive, cheat or defraud. The evident purpose of the statute was to prohibit *false* representations and statements concerning the value or facts affecting the value of securities made with intent to cheat, deceive or defraud. The wording of the act attempts to make it a criminal offense to make a representation or statement concerning the value or facts affecting the value of securities if made with intent to cheat, deceive or defraud, whether the statement or representation is actually true or false, if the person making it has reasonable ground to believe it to be false. In other words, if the person making a representation with

regard to value with intent to deceive has reasonable ground to believe that statement is false, he is guilty under this statute even though the representation be actually true. The statute does not say that one who makes a *false* representation or statement concerning value, and has reasonable ground to believe it is false, shall be guilty. It declares that any one who makes *any* representation or statement concerning value, which wording necessarily includes any representation, *true or false,* with intent to deceive, and has reasonable ground to believe that his representation or statement is false, is guilty though the representation or statement be actually true.

Section 28-1217, Comp. St. 1929, was enacted in 1921 and appears as chapter 312, Laws 1921. The title is: "An act relating to the representation, making, issuing or publishing of any oral or written statement, letter, representation, report or advertisement concerning the value or facts affecting the value of stocks, bonds or other securities, with intent to deceive, cheat or defraud."

The act attempts to make such false statements criminal, made with intent to defraud, if known to be false, or if by reasonable diligence they could be known to be false or there was reasonable ground to believe them false. The last two provisions which provide that the crime may exist without knowledge make the act broader than the title. In a recent case, this court held: "An act must not be broader than its title, and where the subject of the legislation is not clearly expressed in the title, the act will be in contravention of section 14, art. III of the Constitution." *Moeller, McPherrin & Judd v. Smith,* 127 Neb. 424. In *State v. Dawson County Irrigation Co.,* 125 Neb. 836, it is said: "If the act is broader than its title, then, to the extent that it goes beyond the scope of its title, it is invalid. This rule is so well established that citation of authorities to sustain it is not deemed necessary."

The crime defined by the statute as the making of

false statements with intent to defraud is limited by the title to those making the statements with knowledge of their falsity. It cannot include those who make false statements without knowledge of falsity. A statute must not be broader than its title. Const., art. III, sec. 14.

Title of act reading "to provide punishment for one who makes statements or representations with intent to defraud" is not broad enough to include imposition of penalty upon one who does not know that the statements and representations are false, but by the exercise of reasonable diligence could have known, or who had reasonable ground to believe that any material representation is false.

The defendant at a proper time in the proceedings moved to quash the indictment, which motion was overruled. The portions of the indictment material here are: That Jo Joseph and others "did * * * unlawfully and feloniously conspire and agree together * * * to commit a felony by making, issuing and publishing certain oral and written statements and advertisements concerning the value of certificates of stock, with intent to deceive, cheat and defraud, then and there well knowing that said statements were false and in violation of section 28-1217 of the Compiled Statutes of Nebraska for 1929; and pursuant to said unlawful and felonious conspiracy, did then and there with intent to deceive, cheat and defraud, represent, make, issue and publish, and did then and there participate in the representation, making, issuance and publication of, certain oral and written statements, letters, representation, reports and advertisements concerning the value of, and as to facts affecting the value of, certain certificates of stock, and at the time of making, issuing and publishing said oral and written statements, letters, representation, reports and advertisements, affecting the value of said certificates of stock, the above named conspirators knew, or had reasonable grounds to believe, that said representations, predictions and promises made in such statements, letters, representation, reports and advertisements were false."

Thereafter the indictment relates a number of overt acts of alleged false statements and then concludes with this language: "Said conspirators then and there well knowing, or having reasonable grounds to believe, that said representations, predictions and promises made in such oral and written statements and advertisements were false."

The defendant urged in the trial court and urges now that in a felony case the information or indictment must disclose the nature and cause of the accusation against him. This court has held that, where a statute states the elements of a crime, an information or indictment is generally sufficient which described the crime in the language of the statute. *Cordson v. State,* 77 Neb. 416; *Goff v. State,* 89 Neb. 287; *Philbrick v. State,* 105 Neb. 120.

The indictment, as will be noted, charges the defendant with making false statements relative to value of securities, with intent to defraud, knowing or having reasonable grounds to believe that they were false. It does not charge that in the exercise of reasonable diligence defendant could have known the statements were false. It is also noted that the word "material" is omitted from the charge that defendant had reasonable ground to believe that the (material) representations were false. It is a debatable question whether the omission was prejudicially erroneous to the defendant. However, the court submitted the case to the jury upon the charge in the indictment that the defendant made statements and representations, with intent to defraud, which he knew or had reasonable grounds to believe were false. The latter section of the statute having been determined invalid, a conviction thereunder cannot stand, and it is unnecessary to consider other assignments of error.

REVERSED AND REMANDED.

EARL F. TRIPLETT, APPELLEE, V. WESTERN PUBLIC SERVICE COMPANY: HENNINGSON ENGINEERING COMPANY, APPELLANT.

FILED APRIL 26, 1935. No. 29221.

1. **Venue.** An action to recover damages for an injury to real estate may be brought only in the county where such real estate is situated.
2. **Master and Servant:** NEGLIGENCE OF SERVANT: LIABILITY OF MASTER. When employees, while engaged in building an electric transmission line across a pasture of dry, parched, and highly inflammable grass, dropped lighted matches or cigarettes, starting a prairie fire which burned for miles, the question is not so much whether the employees were acting within the scope of their employment, but whether the doing of the negligent act was reasonably to be apprehended by the defendant company.
3. ———: ———: ———. To hold the defendant company liable, the jury must find that the use of cigarettes at the time and place in question was dangerous; that such employees were in the habit of smoking cigarettes while engaged on this job, which fact was known to the defendant company, which retained such employees after knowing they had violated the instructions given in reference thereto.
4. ———: ———: ———. That at the time the fire was carelessly and negligently set by the employees, they were still within the scope of their employment, and merely combining the performance of their duties with their private pleasure of the use of cigarettes.
5. ———: ———: ———. That the negligent use of cigarettes, in violation of the defendant's orders, under all the circumstances constituted a negligent act performed by an employee while doing his work in an irregular way, for which act the defendant company is liable.

APPEAL from the district court for Thomas county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Kennedy, Holland & De Lacy, Evans & Doyle and *Ralph E. Svoboda,* for appellant.

Hamer & Tye, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

PAINE, J.

This is a negligence action, brought by a Thomas county ranchman for damages caused by a prairie fire alleged to have been started from matches or cigarettes used by defendant's employees.

Earl F. Triplett brought an action against the Western Public Service Company and the Henningson Engineering Company for damages caused by a prairie fire, which started about noon March 9, 1930, and burned over 500 acres of plaintiff's valuable hay land. Plaintiff alleged that such fire greatly reduced the fertility of the land, so that it produced no hay during the years 1930 or 1931, as the roots of the natural grass growing thereon were ruined by said fire, and the soil, which is of a light, sandy nature, without the protection of the grass which had been burned off, became loose and shifting, and large blowouts and sand-pits formed, causing injury to the land itself; that, in addition, the fire burned 60 tons of hay which had been cut and bunched on said land.

Plaintiff alleged that the Henningson Engineering Company hired a large number of men, and that said men and their superintendent and foreman were addicted to smoking while engaged in the work, such fact being well known to the defendant and its officers; that the grass on said land was parched, dry, and highly inflammable, where fires were easily started and difficult to control or extinguish; that while so engaged in constructing the transmission line, employees of the Henningson Engineering Company carelessly and negligently threw burning matches and cigarettes into the dry grass and weeds, setting a fire which spread over the entire tract owned by the plaintiff, and plaintiff asked damages in the sum of $2,100.

The Henningson Engineering Company alleged that its principal place of business was in Omaha; that it had no agent in Thomas county, and that it was not jointly liable with the codefendant, Western Public Service Company, but was an independent contractor, constructing a certain transmission line between Seneca and Dunning for the

Western Public Service Company, and that its employees were not engaged in any business in the vicinity of the alleged fire at the time it started, and if any of its employees did smoke cigarettes or cast matches in dry grass, said employees were not at that time in the discharge of their duties for the defendant, and that any such action was outside of the course and scope of their employment, and that when their employees saw the fire they proceeded to the fire and endeavored to put it out, and being unable to do so went to the nearest town and summoned help, and that the employees thereupon engaged in resisting the common peril, and within two hours had put out the original fire; that the original fire was not over the land of plaintiff, but that the fire which burned over his land was started by some unknown person as a backfire. Defendant asks that the petition be dismissed. The trial court dismissed the cause as to the Western Public Service Company upon motion, and the jury returned a verdict against the Henningson Engineering Company in the sum of $807.34.

The defendant presents as its first error of law the jurisdictional objection raised by its special appearance and demurrer, and also in the answer, that it was not suable in Thomas county, Nebraska. The trial court overruled the contention of the defendant, holding that under section 20-401, Comp. St. 1929, actions to recover damages for any injury to real estate shall be brought only in the county where such real estate is situated, and that the early cases cited by the defendant, *Delaney v. Errickson*, 10 Neb. 492, and *Burlington & M. R. R. Co. v. Beebe*, 14 Neb. 463, were decided prior to the enactment by the legislature of this section of the statute in 1889. A portion of this section of the statute was found in the Laws of 1866, but the first seven lines of such section, relied upon by the plaintiff, were added by an amendment, chapter 29, Laws 1889.

Our court had before it a case involving this section of the statute in *Jacobson v. Lynn*, 54 Neb. 794, and while

the case seems never to have been cited by our court it appears to be quite in point. The records in this court show that Lynn filed a bill of particulars in justice court in Knox county to recover $150 damages for defendant's cattle trespassing upon and destroying hay on the northeast quarter of section 4-29-1 in Cedar county, Nebraska, belonging to the plaintiff. Motion was filed to dismiss the action because the court had no jurisdiction. Motion was overruled, and the jury rendered a verdict for $35 and costs. The defendant appealed to the district court. In the petition filed in the district court, the plaintiff asked damages for the destruction by the defendant's cattle of 75 acres of grass and three tons of hay on his Cedar county land. Defendant filed motion to dismiss for want of jurisdiction in the district court, which was overruled, and a trial resulted in a verdict of $1 and costs, and the defendant brought the case to this court. The court held that the language of the section of the statute now known as section 20-401, Comp. St. 1929, was so plain, direct, and unambiguous as not to require any judicial interpretation, and held that an action to recover damages for trespass upon real estate can be brought alone in the county where the lands are situated, and that such action is not transitory, and the courts of one county have no jurisdiction to hear, try and determine a suit to recover damages to real estate located in another county, or else the statute cited is meaningless. We are entirely unable to see any distinction between this case, where a man's land was damaged by cattle trespassing thereon, and the case at bar, where plaintiff's land was damaged by a prairie fire alleged to be negligently started, and in our opinion the trial court was right in the instant case in holding said defendant to answer for injury to the land itself, which action can be brought only in the county where such real estate is situated; and it was contended in the argument that no special objection was made to joining the claim for personal property damage to the claim for permanent damage to the land.

However, the trial court in instruction No. 14 limited the measure of plaintiff's recovery to the difference between the fair market value of the land which the jury found was injured by fire, immediately before and immediately after the fire.

The defendant urges as a further error the admission of the testimony of the alleged conversation between the witness Crawford and an employee, Rasmussen, as admission with reference to the cause of the fire, it being the defendant's claim that, if this evidence had been excluded by the court, plaintiff would have had no proof of the connection of the Henningson Engineering Company with the fire. It appears in the evidence that John Crawford, a ranchman, owning 1,114 acres, living about three miles from the plaintiff's land, had been out fighting this prairie fire, and testified that the fire originated within three feet of the transmission line being built by the defendant company. That Fritz Rasmussen, a foreman of a pole gang for defendant company, came to his place during the course of the fire, and in a conversation between Crawford and Rasmussen the origin of the fire was touched upon. At the trial question No. 599 was asked Crawford, reading as follows: "Anything said as to the origin of the fire, as to how it started? A. He said one of the boys had started a fire." No objection was made by the defendant's counsel to this particular question, and no motion was made to strike out the answer. There is also evidence that a pair of climbers was found at the foot of a pole near where the fire started.

A witness, Clint Hardy, upon whose land the fire originated, testified that he had no range riders, and that nobody in his employ was about there that day. Q. 392: "How far was the transmission line at the point where this fire burned from any road? A. Well, better than half a mile." He then said there was no fire between the public road and the transmission line.

Witness Hardy also testified that he was engaged by Foreman Rasmussen, and worked on this line the day

before the fire; that four men were working with him; that these employees started three fires that day, which they extinguished; that at that time he told these men that without a doubt they would burn the country off if they were not more careful with their smoking, and that the foreman himself smoked that day.

There was some evidence as to why defendant's employees were near the place where the fire started Sunday, and Hardy testified that the day he was working there he heard "Boss" Martz say to the foreman of the wire gang, Rasmussen, "Send the crew back through here in the morning and slack this line eight inches," but that the witness, Hardy, did not work with them on Sunday.

F. A. Martz was a construction foreman and had charge of the 15 or 18 men working on this transmission line. He testified that Rasmussen was top foreman of one crew. Mr. Martz testified that, when he came up to Thomas county about a month in advance and made an inspection with another engineer on the Halsey government forest reserve, Mr. Thompson cautioned them against smoking; that later, when the crews came to start work, instructions were issued by Mr. Henningson that the men must be kept from smoking while on duty. Mr. Martz testified that he was a moderate smoker, but that he never observed any men smoking on the job.

Gragg and Utter were the two men doing the work Sunday morning. Gragg denied that either of them were smoking that Sunday morning, and testified on cross-examination that when he first saw the fire it was about a block from where they were, and at that time was about 75 feet wide and 200 feet long, and that he saw nobody else around, and no one else had gone through; that when they first saw it they got right in their Ford truck and drove to town and told Rasmussen, their boss, and a lot of men got in the truck and they all drove right back to fight the fire; that when they got back the fire was a mile long.

The jury found for the plaintiff on the disputed ques-

tions of fact. There is sufficient evidence to justify the jury in finding that these two employees were smoking on Sunday, as they were on Saturday, and carelessly started this fire, the same as they started three fires Saturday, especially as no one else was in this inclosed pasture at the time, and they admit they were close to it in point of distance when it started. Their acts in immediately rushing back to town and reporting to their foreman, and returning to this fire they had discovered, accompanied by the foreman and other employees, and all then fighting it for hours, were doubtless some of the evidence leading to the verdict.

The defendant argues strongly that in Nebraska a master is never liable for the acts of a servant committed outside the scope of his employment; if a servant steps aside from his master's duties for even a moment to do an act entirely personal to himself, or for his own pleasure, the relation of master and servant is then suspended, and the master is not liable. Defendant cites, in support thereof, *Clancy v. Barker*, 71 Neb. 91, in which case a six-year-old son of a hotel guest wandered into the room of a hotel where a waiter was playing a harmonica, and in play he pointed a revolver at the boy, and it was accidentally discharged, destroying the sight of one of his eyes. It was held that the master is not liable for the torts of his servant unless connected with his duties and within the scope of his employment. However, we are unable to find any case in Nebraska involving similar facts to the case at bar.

Palmer v. Keene Forestry Ass'n, 80 N. H. 68, 13 A. L. R. 995, is a case where the defendant was employed to set out trees in a field, and one of his laborers carelessly dropped into the dry grass a lighted match, by reason of which the fire spread over the field, burned the trees, and destroyed the plaintiff's buildings. The defendant's position was that there was no evidence showing that the defendant had knowledge that this laborer was addicted to the use of cigarettes. The evidence tended to show that

some of the men, including the foreman, smoked while doing their work, and that they were not forbidden to smoke while at work, and that the jury would be justified in finding that the defendant ought to have known of this habit of its workmen. It would follow that the defendant would be chargeable with the knowledge that ordinarily prudent men would possess upon this subject, and ought to have provided, by instruction or otherwise, against the practice of the habit when it was liable to result in serious damage to third persons. It was argued that the men were not engaged in defendant's business when the fire was set; that smoking was no part of the work they were hired to do, and hence the defendant was not liable. It is held that the question is not whether the men, in dropping lighted matches into the grass, were acting within the scope of their authority, but whether the doing of the act was reasonably to be apprehended by the defendant.

In *Jefferson v. Derbyshire Farmers, Ltd.* (1921) 2 K. B. 281, 13 A. L. R. 989, being in the English court of appeal, a young man employed by the defendants in a garage in Ashbourne, in the county of Derby, while drawing a two-gallon tin of benzol from a 50-gallon drum, turned on the tap, and while it was running he lighted a cigarette and threw the match on the floor. A fire started in a flash, and no one could get near enough to turn off the tap, and the garage burned down. It was held that the employee, being engaged in an act which was within the scope of his employment, having failed to exercise caution, was guilty of negligence in the course of his employment, and the defendants were held liable for the resulting damage. It was said that a master is liable for the act of his servant in the course of his employment if the act is negligent. While in this case it seems to be the theory of the court that the act of the servant in continuing to draw the explosive in the presence of fire, rather than his act in throwing down the lighted match, was regarded as the proximate cause of the injury, it appears that this distinction is rather far-fetched, and that to all

intents and purposes the effect of the holding is that if, while the explosive was running out to fill the two-gallon can, the employee threw down a lighted match, which caused the fire that burned the garage, he was so negligent that his employer was responsible therefor.

In *Keyser Canning Co. v. Klots Throwing Co.*, 94 W. Va. 346, 31 A. L. R. 283, a silk manufacturing company conducted its business in a wooden building, amid highly inflammable surroundings. A young man in its employ was known to be a smoker of cigarettes, and had been frequently warned against smoking upon its premises. He was permitted to sleep at night in the premises, notwithstanding the company had knowledge that he was continuing his habit of smoking and was disobedient to the instructions. A fire started when this employee negligently threw a lighted cigarette stub into a waste-basket. The fire spread and destroyed a neighbor's property. It was held that the silk manufacturing company was responsible for the loss of the property. This case goes much farther than we are asked to go in the case at bar, for the fire occurred during the nighttime, during the hours when the young man was not employed.

There is an English case, *Williams v. Jones*, 159 Eng. Reprint, 668, decided in the Exchequer Chamber February 7, 1865, which is the earliest case we have found involving a fire negligently started by smoking. The facts are that the plaintiff, having sold some boards to the defendant, lent him the use, free of cost, of one of three sheds, in which to have the boards made into a signboard. The defendant employed a carpenter named Davies to do the job. While Davies was at work on the signboard, a stranger came in, filled his pipe with tobacco, and at the request of Davies gave him sufficient tobacco to fill his pipe also. The stranger then struck a match, with which he lighted his own pipe, and Davies, having lighted a shaving at the flame of the match, after lighting his pipe with it let it fall negligently, and in endeavoring to kick away the shaving other shavings were ignited, and the three sheds

of the plaintiff were all burned. The jury found that the fire was caused by the negligence of the defendant's servant, and gave a verdict for plaintiff for the value of the three sheds. Judges Keating, Erle and Smith held that the defendant was not liable because the act of lighting the pipe was in no way connected with the making of the signboard, which alone Davies was employed to do. It was said in this opinion that if, instead of bringing into the shed tobacco and matches, the stranger had brought in squibs (firecrackers), and they had diverted themselves with setting off the squibs, and fire followed, it could not be said that the master would be liable as being an act done in the course of employment. It is stated that, had the defendant known that Davies was in the habit of smoking on such occasions and took no precautions against his doing so in the plaintiff's shed, he might perhaps have been made liable in another form, but that there was no evidence of anything of the sort. Two of the judges took the contrary view. Mellor, J., said that the making of the signboard and the use of the shed could not be disconnected, and that permission given to use the shed, and negligence in the use thereof, appeared to him to fall strictly within the course of Davies' employment, and that therefore the defendant was liable. Blackburn, J., said that the general rule of law was clear that, where the relation of master and servant existed, the master was responsible for the consequences of any negligence of his servants in the course of the employment, although the master was not a party to such negligence, and even did his best to prevent it; as, for instance, where the master, selecting a coachman believed to be sober, sends him out with orders to drive quietly, and the coachman gets drunk and drives furiously. "In such a case it may seem hard that the master should be responsible, yet he no doubt is if he be his master within the definition stated by Parke, B., in *Quarman v. Burnett* (6 M. & W. 499, 509), that the person is liable 'who stood in the relation of master to the wrong-doer—he who had selected him as his

servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey.' " Blackburn, J., concluded that the negligence of Davies was negligence in the course of his employment, such as to be in law the negligence of his master, the defendant.

In *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433, 90 Am. Dec. 210, the railroad company employed as flagman a man who was an habitual drunkard, which fact was known to the officers of the company, or by due care might have been known, and while so intoxicated he misplaced a switch, whereby another employee was injured, and it was held that the railroad company must pay the damages returned by the jury.

In our opinion a statement of the law covering the case at bar was set out by instruction No. 12 given by the trial judge. We condense and abridge this into the following statement: It is clear that the smoking of cigarettes was in no way incident to or any part of the employment of the agents and employees of the defendant corporation; that before the defendant could be held liable for the wrongful act of any of said employees, the jury must find that smoking at the place in question was dangerous, and that fire might be ignited by throwing matches or cigarettes in dry grass; that the employees of the defendant were in the habit of smoking while engaged in their duties, which fact was known to the defendant; that, having knowledge thereof, the defendant corporation carelessly and negligently suffered and permitted this dangerous practice to continue, and took no adequate steps to abate the same, and that by reason thereof the fire in question occurred.

It is a general rule, supported by many cases, that the retention in employment of a servant known to be habitually negligent is negligence on the part of the master which will render him liable for injuries to third persons resulting from the acts of the incompetent servant, whether the master's knowledge of such incompetency is actual

or constructive. 39 C. J. 1267. It has also been held that, to charge a master with liability for unauthorized acts of his servant, it must be shown that he had either actual notice thereof or that such acts were committed so frequently and under such circumstances as to justify the presumption of notice (39 C. J. 1265), but in the case at bar there is some evidence to show that the foreman in charge of these men was not only well acquainted with their habits, but that he himself smoked cigarettes, and the knowledge of this foreman would be the knowledge of the master.

Perhaps the best discussion of the recent trend of opinion is found in *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corporation,* 49 Fed. (2d) 146. The tank company was employed to dismantle a battery of oil tanks near Seminole, Oklahoma, and one of the workmen stopped in his work to light a cigarette, and threw the match on the oil-soaked ground. An insurance company paid $18,371.38 to apply on the loss, and sued the tank company. McDermott, Circuit Judge, discusses many cases, and said:

"Appellant next contends that, even if the workman was its servant, the lighting of a cigarette was not an act done in the course of his employment. * * * There is a conflict of authority upon the point, but on principle the rule does not seem to be elusive. Workmen are not employed to smoke any more than chauffeurs are employed to drive cars on sidewalks. Smoking is a pastime of the employee. * * * We have no quarrel with cases that decline to hold a master where a servant has stepped aside from his employment and has lighted a cigarette in surroundings where it could not reasonably be anticipated that damage would follow that act. * * * But the law is otherwise where the master sends out servants to do work, the nature of which is such that the master knows that damage is apt to occur if the servant smokes or strikes a match. In such a case the duty devolves upon the master to see to it that his servants exercise due care under the existing circumstances."

The evidence in the instant case, although in sharp dispute on some points, would justify the following statement of facts and of the law in relation thereto: That the defendant's employees caused the fire by carelessness and negligence in handling cigarettes and matches while smoking; that they were in this pasture at the time, performing work under the instructions of the foreman; that if they had not been in the defendant's employ and on its business, they would not have been at the place at which the alleged wrongful act occurred; that the defendant company had knowledge of the habits of such employees to use cigarettes while engaged on the job; that it had knowledge that such use of cigarettes while working across this pasture land of dried and parched grass was inherently dangerous and might result in starting prairie fires which would cause great damage to ranchmen in that neighborhood; that there was no abandonment of the defendant's business while the employee was thus smoking, but the employee merely combined the defendant's business with the employee's private pleasure of smoking; that such smoking was in violation of the defendant's orders, but under all the facts and circumstances it constituted a negligent act performed by the employee, while doing his work in an irregular way, for which wrongful and negligent act the defendant should be required to respond to the plaintiff suffering damages thereby. *Rish v. Iowa Portland Cement Co.*, 186 Ia. 443; *Wood v. Saunders*, 238 N. Y. Supp. 571; *Jones v. Weigand*, 119 N. Y. Supp. 441; *Fields, Inc., v. Evans*, 36 Ohio App. 153; Mich. Law Review, March, 1931, p. 640; *Boatright v. Steinite Radio Corporation*, 46 Fed. (2d) 385.

We have examined all of the errors set out in the brief for reversal, but, having given such an extensive review of the authorities on this interesting question, which comes to this court for the first time, we must simply be content with saying that we find no prejudicial errors in the judgment entered on the verdict, and the same is hereby

AFFIRMED.

ROSA OFT, APPELLEE, V. MINNA OHRT, APPELLANT.

FILED APRIL 26, 1935. No. 29251.

1. **Deeds: REFORMATION: PAROL EVIDENCE.** A deed to real estate, if it is a conveyance not voluntary, like any other written contract, may be impeached by either party thereto for fraud or mistake, and parol testimony is competent to reform it so as to make it recite the actual agreement between the parties.
2. ———: ———. A conveyance is "not voluntary" so as to permit of reformation when it is supported by a valuable and meritorious consideration.
3. **Witnesses: COMPETENCY.** In an action by a married woman to reform a deed to real estate, her husband has a direct legal interest in the result, within the meaning of section 20-1202, Comp. St. 1929.
4. ———: ———. If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and makes the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, he is a representative of a deceased person, within the meaning of section 20-1202, Comp. St. 1929.
5. ———: ———. In an action by an heir at law of a deceased grantor, to reform a deed because of mistake, other heirs, not parties to the action, do not have a direct legal interest, within the meaning of section 20-1202, Comp. St. 1929, and may testify as to personal transactions and communications between them and the deceased, and to any facts of which any other witness might testify.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Reversed.*

Robins & Yost, for appellant.

John A. McKenzie, contra.

Heard before GOSS, C. J., GOOD, DAY and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

CARTER, J.

This is an action brought by Rosa Oft, the appellee, against her daughter, Minna Ohrt, the appellant, for the

amount due under the terms of an annuity clause contained in a deed to certain real estate conveyed by appellee and her husband to the appellant. The trial court found for the appellee and entered judgment for the sum of $1,084.79. From the overruling of her motion for a new trial, the appellant brings the case here for review.

The record shows that on February 8, 1919, Eggert Oft and Rosa Oft, his wife and appellee herein, conveyed 153 acres of land to their daughter, Minna Ohrt, by warranty deed containing the following clause: "The grantee herein, agrees to pay to the grantors, as long as either one may live, Five Hundred Dollars ($500) on the first day of September each and every year, this being part of the consideration." The evidence is undisputed that each and every annual payment was made up to and including the year 1930. On September 1, 1931, the sum of $50 was paid on the amount that came due on that date. This suit was commenced to collect the balance of the 1931 annual payment and the whole of the 1932 amount.

In her answer, the appellant alleged that it was the understanding and agreement of the grantors and grantee of the deed at the time it was executed and delivered that the consideration was for services rendered in the past, and that the $500 annual payment was conditioned upon said payment being necessary for the support and maintenance of grantors or either of them, and conditioned also upon the land producing $500 above costs during the year for which said payment is requested, and further conditioned upon each of the daughters to whom conveyance is made of even date paying equal amounts necessary and proper for support and maintenance, and asked to have the deed reformed to correctly state the agreement. Appellant further pleads that the farming operations have resulted in a loss for the years 1931 and 1932 and as a result thereof there is nothing due.

Under our previous holdings, a deed may be reformed to make it comply with the true agreement entered into, unless it is a voluntary conveyance. *Beall v. Martin,* 48

Neb. 479; *Mitchell v. Griffith,* 87 Neb. 140. That the deed of conveyance was not a voluntary one is very apparent. A deed given for a valuable and meritorious consideration is not a voluntary conveyance and may be reformed so as to set forth the true agreement of the parties. In *Pinkham v. Pinkham,* 60 Neb. 600, it was held: "A deed of conveyance founded upon a consideration to be paid to a third party therein named, and for labor expended on the premises conveyed, and for care and support of the grantor, is not a voluntary instrument, and mistakes in its execution may be corrected in a court of equity." The case at bar falls squarely within the above rule.

Appellee contends that the offered evidence by appellant is violative of the parol evidence rule and inadmissible for that reason. To this we cannot agree. This court has held: "The courts are invested with authority 'to reform,' as it is called, a written contract, when, by mistake or fraud, the written instrument does not express the actual contract made by the parties. This is but another method of stating the rule that a party when sued upon a written contract may show by parol testimony that through fraud or mistake the written instrument exhibited does not recite the contract actually made." *Slobodisky v. Phenix Ins. Co.,* 52 Neb. 395.

In support of this defense, the appellant offered the testimony of herself, her husband and others as to conversations she had with her parents prior to the execution and delivery of the deed concerning the terms under which the land was to be conveyed. This was objected to on the ground that it was a conversation and transaction between the appellant and a deceased person and was therefore barred by section 20-1202, Comp. St. 1929. The trial court sustained the objection and the ruling is one of the errors of which complaint is made.

Were the appellant and her husband competent witnesses? Section 20-1202, Comp. St. 1929, is in part as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse

party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." There can be no question that appellant has a direct legal interest. Has the husband a direct legal interest? We hold that he has. This precise question was passed on by this court in *McEntarffer v. Payne,* 107 Neb. 169, wherein the court said: "Appellant argues that her husband has no direct legal interest. We think the correct solution of this lies in the answer to the question: Will the husband gain or lose by direct legal operation of a judgment in this case? This was under consideration in *Holladay v. Rich,* 93 Neb. 491, and, because the husband has an interest in her real estate, under the present statute, which cannot be defeated by any act of the wife, it was held that the husband could not testify." In *Holladay v. Rich,* 93 Neb. 491, it was held: "In an action by a married woman for specific performance of a contract to convey real estate, her husband has a direct legal interest in the result, within the meaning of section 329 of the Code." The question is then raised whether the appellee, as the widow of Eggert Oft, deceased, is a representative of the said Eggert Oft. In *McCoy v. Conrad,* 64 Neb. 150, it was said: "If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made if living, or to establish a claim which the deceased might have been interested to establish if living, then he may be said, in that litigation, to represent a deceased person." This language is quoted with approval in *McEntarffer v. Payne, supra.* Also, in *Holladay v. Rich, supra,* it was held: "In an action to set aside a deed executed by a person afterwards deceased, because the same was executed in violation of an alleged contract of the grantor with the plaintiff, the defendant who claims under such deed is the representative of a deceased person, within the meaning of section 329 of the Code." Clearly, under these authorities, the appellee is a representative of a deceased

person within the purview of the statute. We therefore hold that appellant and her husband are not competent witnesses in the case at bar. The appellant contends that the conversations were with the appellee, and not with the deceased person. If this were true, the agreement which appellant is attempting to establish would not have been binding upon the deceased grantor and would be objectionable for that reason. The deceased was the grantor of the land conveyed and certainly a change in the terms of the conveyance could not be shown in any event unless it was established by competent evidence that the deceased was a party to the true agreement. The evidence discloses that the purported conversations were with the "parents" of the appellant. This shows that the deceased was a participant in all the conversations and the statute therefore applies.

Appellant contends that, even if she and her husband were incompetent witnesses, the other witnesses called were competent and should have been permitted to testify. The other witnesses were the two sisters of the appellant and their husbands. We are convinced that they are not barred as incompetent witnesses by virtue of section 20-1202, Comp. St. 1929. While it is true that each of the sisters had a similar contract with the appellee and her deceased husband and are possibly indirectly interested in the result of the case at bar, yet the authorities seem to hold that they are not barred. In the case of *Lyon v. Ricker*, 141 N. Y. 225, it was held: "The fact that the brother of the plaintiff occupies the same position in regard to his seventy-five acres as the plaintiff does to the land described in this deed, does not render the brother's evidence incompetent." In *Hobart v. Hobart*, 62 N. Y. 80, it was held: "In an action by an heir at law of a deceased grantor, to set aside deeds, because of incompetency, and for fraud and undue influence, other heirs, not parties to the action, are not interested in the event thereof within the meaning of section 399 of the Code, and may testify as to personal transactions and communications

between them and the deceased, and to any facts which any other witnesses might testify to. The success of the plaintiff would not affect them, as the deeds would still be valid against them. At most they are only interested in the questions involved, but this does not disqualify them, only going to their credibility." We believe the argument contained in these cases is sound and that the two sisters of appellant, and their husbands, were competent witnesses.

The appellant offered to prove by these witnesses what the true contract was and that it was entered into in its present form because of a mistake of the parties thereto. Appellant was entitled, under the allegations of her answer, to have this evidence submitted for the consideration of the court, and if she could sustain her allegations by the proof required by the law, she would be entitled to have the deed reformed. We are of the opinion that they were competent witnesses and that the trial court should have received their evidence.

In view of the fact that the error of the trial court in rejecting this testimony necessitates a new trial of the case, it will not be necessary for us to consider other alleged errors which appellant contends were prejudicial.

REVERSED.

LEON R. CARTER ET AL., APPELLEES, V. ROME MILLER, APPELLANT.

FILED MAY 1, 1935. No. 29168.

Contracts: PROOF. Evidence in the record examined, and *held*: First, to clearly establish affirmatively that the so-called contract for lease, or lease, in suit, was never legally entered into or authorized by the defendant; second, that there is insufficient proof to support the findings and judgment of the trial court; and, third, that the district court erred in overruling the defendant's motion, at the close of all the evidence, for a directed verdict in his behalf.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

Hotz & Hotz, for appellant.

Gaines, McLaughlin & Gaines, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

EBERLY, J.

This was an action by Carter and Noyes, copartners, against Rome Miller, to recover damages for failure to perform the covenants and agreements of a lease alleged to have been made by him and covering a certain lot in Omaha, Nebraska. By proper pleading the substantial allegations of plaintiffs' petition were traversed, and the making of the engagements therein alleged were denied. A trial resulted in verdict and judgment for plaintiffs. From the order overruling his motion for a new trial, defendant appeals.

It seems conceded by the parties that no formal written lease was ever delivered by defendant to plaintiffs. The issues as made by the pleadings, as well as the facts developed by the evidence, imposed on plaintiffs the burden of establishing a binding express contract.

"To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." *Melick v. Kelley,* 53 Neb. 509.

"That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement." *Krum v. Chamberlain,* 57 Neb. 220. See, also, *Olmsted v. Caldwell,* 110 Neb. 18; *Cooper v. Kostick,* 112 Neb. 816; *O'Shea & Son v. Leavitt,* 125 Neb. 12.

Rome Miller is the alleged maker of the lease in suit, and the fundamental question to be determined by the evidence is whether or not it establishes a definite propos-

al related to the subject-matter of the action to or by him, and an unconditional and absolute acceptance thereof by the party to whom the same is made.

In this connection, it appears without substantial dispute in the evidence that the lot in question had been leased by Rome Miller to the Easy Parking Company, a corporation, in 1927; but that this corporation was still in possession thereunder as tenant holding over during the period covered by the events which form the source of the present litigation. In 1930 Miller had a conference with William J. Hotz, an attorney, and at least tacitly authorized the latter to recover possession thereof for him. In January, 1931, the plaintiffs in this action applied to George & Company, a real estate firm of Omaha, Nebraska, who were not then the agents of defendant, Miller, and in fact at that time had no relations whatever with him, to secure a lease of the lot here in controversy. Miller was then in Los Angeles, California. On January 26, 1931, George & Company wrote a letter to Miller at that place and submitted an offer of $100 a month rental for the lot in suit, for the period of one year, on behalf of Noyes and Carter. The evidence is that this letter was never answered by Miller, but was consigned to the waste-paper basket by the recipient. On February 6, 1931, receiving no answer to their communication of January 26, George & Company again addressed a letter to Miller, repeating their previous offer. Some time after this was done, plaintiffs' witness, Huston, who was then in the employ of George & Company, testifies that he was orally communicated with by William J. Hotz, who was defendant's attorney, and Hotz instructed him to go ahead and draw a lease "according to the terms that we had submitted to Mr. Miller." Further, "that the deal could be worked out with these gentlemen (plaintiffs)." Accordingly about February 12, 1931, he (the representative of George & Company) drew a lease in duplicate for the lot in suit, had the same executed and acknowledged by plaintiffs, and secured from them the payment of $200 in cash. There is

a conflict in the evidence as to whether the lease, in duplicate, was delivered to Hotz and by him forwarded to Miller in California, or whether this instrument was mailed to Miller direct by George & Company. At all events, Miller made no reply to George & Company concerning this last communication or the proposed leases inclosed to him. The money collected by George & Company was never forwarded to Miller, nor paid to any one in his behalf.

Miller testifies, by deposition taken in California, in part, substantially as follows: That he had discussed the matter of the occupancy of the lot in question by the Easy Parking Company with his attorney, William J. Hotz, of Omaha, Nebraska, while in Omaha during the summer of 1930; that his instructions to Hotz at that time were not in writing; that he had never entered into a contract, either oral or in writing, with George & Company as to the leasing of lot 8, block 169, original city of Omaha, Nebraska (the lot in suit); that he received two letters from George & Company; that the letter of January 26, 1931, was consigned to the waste-paper basket on reading, and was never replied to; that the letter of February 6, 1931, from George & Company was received, but he never in any manner communicated to the writers thereof with reference thereto; that he never authorized George & Company to execute a lease for him or in his behalf to William E. Noyes and Leon R. Carter for the property in question; that he received no payment whatever on the proposed lease, nor did he authorize any one in his behalf "to accept money upon this property for a lease from Noyes or Carter;" that he received a lease made out to Noyes and Carter which he signed and acknowledged on February 16, 1931, and forwarded to his attorney; that he never authorized his attorney, William J. Hotz, to make delivery of this lease to plaintiffs in this action; and in explanation of this fact, he further testified:

"Q. Why was he not so authorized? A. For the rea-

son that I had a tenant on the property then, the Easy Parking Company, and there were some negotiations pending with the Easy Parking Company at the time as to whether they would continue in possession of the property and I sent this executed lease to my attorney to be used by him in the event the negotiations with the Easy Parking Company were concluded by the Easy Parking Company giving up their tenancy and vacating the property. * * * Q. Did you ever give any one any written authority or verbal authority to lease this property in question to Carter & Noyes? A. No; I did not; I merely signed a lease that had been made up by George & Company and sent the lease to Mr. Hotz *for the purpose of looking into the matter.* Q. At that time, did you know anything of the condition of affairs with the tenant that was on the property? A. I did not."

Miller also testified that no rent was ever tendered him by George & Company or any one else in behalf of plaintiffs, and that he never replied to George & Company's communications.

William J. Hotz corroborates the testimony as to lack of authority conferred upon him by Miller in this transaction to complete the lease sent him or deliver the same to the plaintiffs. The undisputed competent evidence in the record shows that Miller forwarded the duplicate leases to Attorney Hotz "to look into." It will be remembered that in this case Miller is admittedly the source of all authority, and rights claimed must be traced to him. Any unauthorized acts and statements of Hotz, even if such there were, would be in no manner binding upon Miller.

In view of Miller's conceded absence from the scene of this transaction, the controlling principle is: "A person is not as a rule bound by the contracts of one who assumes without authority to represent him as agent, nor by contracts made by his agent beyond the scope of his actual or apparent authority, nor by acts done in connection therewith without authority or in excess of authority." 2 C. J. 834.

So, also, "Evidence that one is acting for another is not sufficient to prove authority so to act." 10 Ency. of Evidence, 31. See, also, *Walsh v. St. Paul Trust Co.*, 39 Minn. 23.

Likewise, agency cannot be proved as against others than the alleged agent, by his declaration not brought home to the principal. 10 Ency. of Evidence, 15; *Burke v. Frye*, 44 Neb. 223; *Richardson & Boynton Co. v. School District*, 45 Neb. 777; *Anheuser-Busch Brewing Ass'n v. Murray*, 47 Neb. 627; *Blanke Tea & Coffee Co. v. Rees Printing Co.*, 70 Neb. 510.

To authorize a recovery in the instant case, plaintiffs must establish by a preponderance of the evidence, not only an actual offer to Miller, but also an actual, unconditional acceptance of the terms of the proposed lease by Miller, or his agent, thereunto duly authorized.

"Words or conduct amount to an acceptance only if they show that the offeree means to accept the offer. * * * Silence does not amount to assent; and cross-offers do not constitute a contract." 1 Page, Contracts, 224, sec. 151.

Indeed, a statement by a principal to his agent showing his intention to accept an offer made by a third person, but not authorizing the agent to communicate such acceptance to such third person, is not an acceptance. *Keene v. Lowenthal*, 83 Miss. 204.

The form in which the offer was submitted by George & Company in no way affects or modifies the controlling principles involved in the transaction. It must be deemed merely an offer made by mail. The fact that an unaccepted offer purports to be a contract does not change its legal effect, or make it a binding obligation before acceptance. *Holmes v. Bloch*, 196 Ala. 322; *Nolin Milling Co. v. White Grocery Co.*, 168 Ky. 417; *Deering & Co. v. Mortell*, 21 S. Dak. 159.

As indicating the extent of the scope of authorities on this subject, though not necessarily strictly applicable to the instant case, it appears to be the rule that if an offer is made by mail, and the offeree mails instructions to his

own agent to accept such offer, the contract takes effect when such agent notifies the offerer of such acceptance, and not when the offeree gives such instructions to his agent. *New v. Germania Fire Ins. Co.*, 171 Ind. 33; *Busher v. New York Life Ins. Co.*, 72 N. H. 551.

The fact that Hotz was the attorney for defendant in no manner implies a right on the part of the attorney at law to bind his client in the manner and to the extent claimed by the plaintiffs in the instant case. In addition, the undisputed evidence is that the lease signed by the defendant was forwarded to Hotz simply for his investigation, "to look into," which is tantamount to an express limitation on the powers of Hotz. See *Raridan v. Bick*, 259 Mich. 200; *McLain v. Nurnberg*, 16 N. Dak. 144; *Commercial Credit Co. v. Crone*, 270 S. W. (Tex. Civ. App.) 209; *Falkenstein v. Gibson*, 108 N. J. Eq. 251; *Stiritz v. Big Muddy Mining Co.*, 257 Ill. 543; *Gorsuch v. Rutledge*, 70 Md. 272; *Harnett v. Korscherak*, 110 N. Y. Supp. 986; *Smith v. Moore*, 149 N. Car. 185.

The undisputed proof in the record is that Miller never accepted the proffered lease; that Hotz as agent had no authority so to do; and that acceptance thereof was not communicated to the plaintiffs by any one.

Thus, the evidence in the record clearly establishing affirmatively that the so-called contract for lease, or lease, in suit, was never legally entered into or authorized by the defendant, there is insufficient proof to support the judgment and findings of the trial court. Further, the district court erred in overruling defendant's motion, at the close of all evidence, for a directed verdict in defendant's behalf.

The judgment of the trial court is, therefore, reversed and the cause dismissed at the cost of plaintiffs.

REVERSED AND DISMISSED.

CHARLES F. BEHR, ADMINISTRATOR, APPELLANT, V. MINNIE O. DULING, EXECUTRIX, ET AL., APPELLEES.

FILED MAY 1, 1935. No. 29270.

1. **Appearance.** An appearance is special when its sole purpose is to question the jurisdiction of the court.
2. ———. An appearance by any form of application invoking the court's power except upon the question of jurisdiction is a general appearance.
3. **Trial: DIRECTION OF VERDICT.** Where the evidence essential to a recovery by plaintiff is clearly disproved by physical facts and conditions, the trial court should direct a verdict for defendant.
4. **Railroads: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE.** "When two persons of equal authority are riding in a vehicle which is driven upon a railroad track in front of an approaching train in full unobstructed view, it is immaterial which of the parties is driving, since, if either party looked and listened, he must have seen the approaching train." *Johnston v. Delano*, 100 Neb. 192.

APPEAL from the district court for Hall county: RALPH R. HORTH, JUDGE. *Affirmed.*

B. J. Cunningham, H. G. Wellensiek and *W. P. Lauritsen*, for appellant.

Wymer Dressler, Robert D. Neely, Hugo J. Lutz and *H. J. Whitmore, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ.

DAY, J.

The administrator of the estate of John H. Behr, deceased, brought this action for damages for wrongful death against the executrix of the estate of Hayes E. Duling, deceased, the Chicago & Northwestern Railway Company and Ed Roeder. At the beginning of the trial, prior to the introduction of any evidence, the trial judge sustained an objection to the introduction of testimony and dismissed the action as to the executrix of the estate of Duling for that the court did not have jurisdiction

over the person. At the same time, a similar objection on the part of the Chicago & Northwestern Railway Company and Ed Roeder was overruled, because they had appeared voluntarily and answered without objection to the jurisdiction. At the close of the testimony, the trial court directed a verdict in favor of the last two named defendants for that plaintiff had not proved any negligence on their part and that there was no evidence to show relationship of Behr to Duling in riding in the automobile in which both were killed.

This case arose out of an accident in which the automobile in which Behr and Duling were riding was hit by a Chicago & Northwestern Railway company train of which Roeder was the engineer. As a result of the accident, both Behr and Duling died. This action was filed in Hall county. No one of the defendants resided there or were served with process therein. Roeder was served in Dodge county, Duling in Lancaster county, and the Chicago & Northwestern Railway Company in Hall county by a summons upon the agent of the Union Pacific Railroad Company. A special appearance of the Chicago & Northwestern Railway Company was filed for that the corporate name was incorrect and that the pretended service was not upon its agent and that it did not operate or transact business in Hall county. This special appearance was sustained and plaintiff given leave to amend his petition by interlineation. Thereupon a summons was sent to Adams county and served on an agent of the Chicago & Northwestern Railway Company there. Afterwards the defendants Roeder, the engineer of the train, and the Chicago & Northwestern Railway Company filed answer without objection to the jurisdiction of the court over them.

The plaintiff asserts that the court erred in dismissing the case as to Duling. The previous recital of the procedural steps reveals that the trial court did not have jurisdiction over any defendant in this case unless there was a waiver of the objection by a general appearance.

The defendants Roeder and the Chicago & Northwestern Railway Company filed answers without objection and thereby waived it.

But the defendant Duling filed a special appearance objecting to the jurisdiction of the court, which was overruled. This is an action which the law requires must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned. Since no defendant resided in Hall county or could be summoned therein, the special appearance should have been sustained. But the plaintiff insists that the pleading of Duling denominated "special appearance" did not limit itself to the particular question and therefore waived the objection. It is well established in this jurisdiction that "An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction." *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29. Many cases are found in our official reports to the same effect. A recent case held that an appearance by any form of application invoking the court's power except upon the question of jurisdiction is a general appearance. *Troyer Furniture Co. v. Orchard & Wilhelm Co.*, 121 Neb. 301.

An examination of the objection to the jurisdiction in this case to determine whether the appearance was special or general discloses that the appearance was special. This defendant alleged thirteen reasons for the dismissal because the court did not have jurisdiction over the person of the defendant. No affirmative relief is sought. Among the thirteen paragraphs are three contending that there is no connection between the cause of action alleged against this defendant and the other two defendants. Three other paragraphs contend that there is no joint liability and none is alleged between this defendant and the other defendants.

The Code provides: "Every other action (the case at bar

comes within this provision) must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned." Comp. St. 1929, sec. 20-409. Section 20-504, Comp. St. 1929, provides: "When the action is rightly brought in any county, according to the provisions of this Code, a summons shall be issued to any other county, against any one or more of the defendants at the plaintiff's request." Unless this action was rightly brought in Hall county, the district court did not acquire jurisdiction over the person of the defendant by service of a summons issued to another county. *Ramirez v. Chicago, B. & Q. R. Co.*, 116 Neb. 740. It has been held that there must be a joint demand against resident and nonresident defendants. *Ayres v. West*, 86 Neb. 297; *Wood v. Carter*, 67 Neb. 133. The validity of the service in Lancaster county of a summons from the district court for Hall county would depend upon a joint and several liability of a defendant residing in or served in Hall county. Therefore the objections urged to the jurisdiction of the court over the person of Duling were not to the subject-matter, but related solely to the court's jurisdiction of the case.

The defendant Duling filed an answer preserving the objection to the jurisdiction. Subsequently in open court an oral request was made to file an amended answer. It is said that this oral request did not preserve the objection to the jurisdiction. Plaintiff's position in this respect is untenable, because the court required the attorney for Duling to state specifically the amendments desired. The answer was so amended and that part preserving the objection to the jurisdiction was retained in the amended answer.

Lastly, the plaintiff contends that the plaintiff's objection to the introduction of testimony was a waiver to the objection to jurisdiction. The objection was for the reason that the court was without jurisdiction. It was sustained. Another reason was stated in the oral objection to the introduction that the petition failed to state facts

sufficient to constitute a cause of action. This was not in fact asking for affirmative relief. The objection was made to the court proceeding to try this case against the defendant which it had no lawful right to do. The order dismissing the action was a proper and lawful one which had been delayed too long. In *Gaines v. Warrick*, 113 Neb. 235, this court held that the question of jurisdiction may be raised by special appearance, regardless of whether it appears from the face of the record, and any error in overruling the same is not waived by answer when the objection is pleaded in the answer. See, also, *Nebraska State Bank v. Citizens State Bank*, 122 Neb. 522. In the case at bar, the special appearance had been overruled and the objection pleaded in the answer. The defendant Duling did not therefore waive the objection by answer or by proceeding to trial upon the merits thereafter. The defendant's attorney was not required to preface every statement made in the trial by a useless repetition of an objection timely made in order not to waive the error.

At the close of the testimony, the court sustained the motion of the defendants, Chicago & Northwestern Railway Company and Ed Roeder, to direct a verdict for the defendants for the reason that the evidence is not sufficient to sustain any of the charges of negligence and not sufficient to sustain a recovery in favor of the plaintiff. In sustaining this motion, the court made the following statement: "I am dismissing the action on the ground that you haven't proved any negligence on the part of the defendants and there is no evidence to show what relationship John H. Behr, the deceased, bore to Hayes E. Duling, deceased, in riding with him in the automobile in which both were killed." This requires an examination of the pleadings and the evidence. The petition alleges that the defendants, Chicago & Northwestern Railway Company and Ed Roeder, were negligent in operating a railway motor car at an excessive speed without furnishing warnings, signs, or without taking due precautions. The plaintiff insists that the Chicago & Northwestern Railway

Company track is hidden from view to a motorist approaching this crossing from the west. The physical facts established by the record negative this claim. The Chicago & Northwestern Railway Company track runs east of and parallel to that of the Union Pacific out of David City to this crossing. At this crossing the tracks are 138 feet apart. The plaintiff, Charles F. Behr, administrator of the estate of John H. Behr, testified that the tracks are about 18 inches higher than the highway and the Union Pacific track 3 or 4 inches higher than the Chicago & Northwestern Railway Company track. Giving this testimony the most favorable construction, the Union Pacific track was elevated 22 inches and the Chicago & Northwestern track 18 inches above the level of the highway. The driver of the car and the passenger were elevated more than this in their seats in the automobile. This same witness testifies that there was no sign reading "two tracks" west of the Union Pacific track and that one could not tell there were two tracks until one was 70 paces from the Union Pacific track which was 138 more feet from the Chicago & Northwestern track. There is a photograph of the highway taken some distance back from the crossing which shows the railway crossing is visible for considerable distance. There is some evidence indicating that the crossing was obscured and hidden so that a motorist coming from the west could not see it. But this evidence is clearly disproved by the physical facts and conditions. Where the evidence essential to a recovery by plaintiff is clearly disproved by physical facts and conditions, the trial court should direct a verdict for defendant. *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692; *Oliver v. Union P. R. Co.*, 105 Neb. 243; *Anderson v. Altschuler*, 125 Neb. 853.

There is no evidence that the railway motor car was operated at an excessive rate of speed. At the time of trial, the petition did not allege that the motor train failed to give warning of its approach. More than a month thereafter, the plaintiff requested leave to amend his peti-

tion to conform to the evidence. Without discussing the right of plaintiff to amend the petition at so late a date, it is sufficient to state that the evidence does not support such an allegation of negligence. Plaintiff's witnesses Reck and Whitney testified that the whistle was blown. Reck stated he did not hear the bell as also did witness Johannes. Witnesses for defendant testified that the signals were given for the crossing. Since the evidence would not support a finding of negligence on the failure to sound signals, there could be no error of the trial court in refusing to allow the amendment.

The facts in this case may be simply stated. Behr and Duling were driving an automobile east on the highway toward this unobstructed railroad crossing at a speed of 50 miles an hour. They did not slacken their speed and were hit by a motor train. As stated by the trial court, the evidence does not establish the relationship of the parties. If the deceased was an invited guest, the standard of duty is the same as the driver's, although the duty is fulfilled in a different way. There is no evidence that he performed this duty, and a failure to perform it would constitute negligence. *Glick v. Poska*, 122 Neb. 102; *Tomjack v. Chicago & N. W. R. Co.*, 116 Neb. 413.

But if he were not an invited guest but was engaged in a joint enterprise the plaintiff cannot recover. In *Johnston v. Delano*, 100 Neb. 192, this court held: "When two persons of equal authority are riding in a vehicle which is driven upon a railroad track in front of an approaching train in full unobstructed view, it is immaterial which of the parties is driving, since, if either party looked and listened, he must have seen the approaching train."

Driving an automobile upon railroad tracks where there is an unobstructed view in front of a train without looking and listening is more than slight negligence and sufficient to defeat a recovery. This rule has been stated so often that it is unnecessary to repeat it here. The evidence is not sufficient to establish that the negligence of defendants, Roeder and the Chicago & Northwestern Rail-

way Company, was the proximate cause of the accident and the death of the plaintiff's deceased. There is no reversible error in the record, and the judgment should stand affirmed.

AFFIRMED.

WALTER A. SCOTT, APPELLEE, V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED MAY 1, 1935. No. 28774.

1. **Appeal.** In a law action where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside on appeal unless clearly wrong.
2. **Evidence** examined, and *held* sufficient to support the verdict.
3. **Insurance:** APPLICATION: ESTOPPEL. Where the agent of a life insurance company takes an application for a policy and assumes the responsibility of answering the questions presented in such application, answers such questions falsely, and without the applicant having made any statement in connection therewith or knowing the manner in which they were answered, the insurer will be estopped to claim that such representations were false.
4. ———: ACTION: DEFENSES. Where both the statutes and the contract for life insurance embody provisions that only such statements as are contained in the application, a copy of which is attached to the policy and indorsed thereon, shall be used in defense of a claim under the policy, a medical examiner's report, which was not contained in the policy, nor attached thereto, nor indorsed thereon, is not admissible in evidence in an action upon such policy.
5. **Trial:** INSTRUCTIONS. It is not error for a trial court to incorporate in its instruction defining the issues the substance of the pleadings which set forth such issues.
6. **Insurance:** ACTION: INSTRUCTIONS. Where, in an action upon a life insurance policy to recover for physical disability arising under the provisions thereof, the court instructs the jury as to what constitutes physical disability, no error having been predicated thereon, the insurer will be considered as accepting the court's version of the law applicable to the facts.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Former opinions withdrawn, and judgment of district court affirmed.*

William Baird & Sons, Reginald Foster and *George Hoague,* for appellant.

Brogan, Ellick & Shoemaker, William A. Stewart, Jr., and *Robert B. Hamer, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and CHASE, District Judge.

CHASE, District Judge.

This is an action founded upon two disability contracts attached to life insurance policies. The case was tried to a jury, resulting in a verdict for the plaintiff, and from an order overruling a motion for new trial the defendant brings the record to this court for review.

The case has been twice considered by this court on previous occasions, and opinions written in each instance. *Scott v. New England Mutual Life Ins. Co.,* 126 Neb. 514; *id.* 127 Neb. 724. Afterward a second rehearing was allowed, and it is again before us for decision.

The appellee, who was plaintiff below, alleges in his petition that on the 18th day of July, 1928, the appellant, who was the defendant below, issued two life insurance policies to appellee, each in the sum of $5,000; that attached to each policy was a disability contract in which the company agreed to pay to plaintiff, for a consideration of $7.50 additional premium, if the plaintiff subsequently became wholly and permanently disabled from disease or other cause, the sum of $50 a month. About the 1st of May, 1931, while the policies were in full force and effect, the appellee became wholly and permanently unable to engage in his usual and customary occupation, or any occupation or profession, or to perform any work whatsoever for compensation, because of a disease of his right testicle.

The appellant, in its answer, denied obligation and lia-

bility under the disability contracts, for the reason that the appellant was induced to enter into the same through fraud, false representations and warranties, and concealment of material facts concerning the condition of his health, in that he stated in the application for insurance that he never had any serious illness or disease; that no member of his family had been afflicted with tuberculosis.

The facts are substantially as follows: Prior to the issuance of the policies appellee was, and still is, a farmer engaged chiefly in agriculture as an occupation; that the appellant issued and delivered two policies of life insurance in the sum of $5,000 each, dated July 18, 1928; that attached to each of these policies was a physical disability agreement which provided that for a consideration of $7.50 additional, upon receipt of proof that the insured has become physically and mentally incapacitated so as to be wholly and permanently unable to engage in any occupation or profession, or perform any work whatsoever for compensation, gain or profit, occurring while the policy and agreement are in full force, the company will pay to the insured a monthly income of $50, and waive payment of premiums thereafter due upon the policy; that in the latter part of 1927, after consulting his local physician, plaintiff found he had some disease of the right testicle, whereupon he consulted Doctor Davis, a physician and surgeon in Omaha, who pronounced his trouble tuberculosis of the epididymis. The epididymis, according to medical lexicographers, is a prolonged cermiform greyish body lying along the superior margin of the testicle. In January, 1928, Doctor Davis performed a surgical operation upon the plaintiff and removed his right testicle. This operation was performed about six months before the issuance of the policies under which this plaintiff claims indemnity.

Several assignments of error are relied on for reversal. Some are so involved with others that it will not be necessary to discuss all in order to properly dispose of the case. One complaint is that the evidence is insufficient to sustain

the judgment. Since the case has been presented to this court twice previously, we have examined the record with unusual care. The disputed issues of fact which were presented to the jury under the pleadings and evidence may be epitomized in two statements: First, was appellant induced by the appellee to write each of these contracts by fraud, false representations and warranties, and concealment of material facts sufficient to avoid liability? Second, has the plaintiff suffered a disability of such a character as is contemplated by the contracts?

The evidence as to the first proposition is seriously in conflict. The appellee testifies that the answers to the questions in the application for insurance were written by the appellant's agent through whom he procured the insurance; that he did not know that the application contained such questions or answers, and that no question was ever asked him by the agent, and he made no answers to any of them.

The agent who took the application testified that he read every question to the appellee, and that the appellee answered the same and the agent recorded the answers of the appellee in the blank spaces following each question.

As to the matter of disability, the testimony shows that since 1932 the appellee, due to this disease of the testicles, has been unable to carry on the usual duties of a farmer; that he was unable to do heavy work about the farm, but did perform such labor as caring for and feeding a few head of live stock in connection with which he shoveled corn and pitched hay in such quantities as was necessary to feed the same; that he also worked at different kinds of employment at short intervals and received compensation therefor; that he played a few sets of tennis on several occasions in the summer of 1931. No witness appears to have been called on the part of appellant to dispute the plaintiff's testimony in this regard.

It will be observed that these disputed issues of fact were submitted to the jury, and the jury resolved both against the appellant. The effect of the jury's verdict is

that they did not believe appellee was guilty of fraud or concealment of material facts, or breach of warranty, in procuring the policies, and that he had suffered a permanent total disability within the meaning of such contract.

In reviewing a law action, this court does not try the case *de novo,* and will not concern itself with the question as to whether the jury reached the proper conclusion of fact, where no errors of law were committed in submitting the questions to them. However, there are some exceptions to this rule, such as where it appears that the verdict is clearly wrong; the result of passion or prejudice; or contrary to the physical facts. For an appellate court to hold that it has the legal authority to set aside the verdict of a jury in all cases where it might disagree with the conclusions of fact reached by such jury would have the indirect effect of abolishing the jury system, and thus deprive the citizen of a highly prized and constitutionally guaranteed right.

In the cases which we have examined where the courts hold that false representations and concealment of material facts avoid liability on insurance policies, the question arose because the trial court had sustained a peremptory instruction and directed a verdict for the defendant, holding the evidence was insufficient to support the plaintiff's theory. All those cases were affirmed on the theory that the fraud and misrepresentation were established so clearly that a verdict for the plaintiff could not be sustained. In this case the situation is distinctly different. As we have said before, the evidence as to fraud and misrepresentation is conflicting, and, being conflicting, the question was one for the jury. It will be remembered in this case that the appellee's evidence is to the effect that he did not write the answers and did not know that they were being written. From the facts the jury might have found either for the plaintiff or for the defendant and there would have been sufficient evidence to support such finding. Therefore, the jury's finding must be considered conclusive.

It is a well-established rule, and often applied by this court, that if the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence, where there is sufficient evidence to support it, will not be disturbed on appeal unless it is clearly wrong. *Anderson v. Lotman,* 124 Neb. 795; *State v. Commercial Casualty Ins. Co.,* 125 Neb. 43; *Dworak v. Shire,* 126 Neb. 474; *Showers v. Jones Co.,* 126 Neb. 604.

The appellant complains that the trial court erred in permitting plaintiff to deny his statements as to his previous health which were in his signed application attached to the policies. The decisions are quite numerous to the effect that where applicant gives to the agent of the insurance company a correct answer in his application, and the agent writes it incorrectly, the company will be estopped to claim that such representation is false. *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554; *German Ins. Co. v. Frederick,* 57 Neb. 538; *Roth v. Employers Fire Ins. Co.,* 123 Neb. 300.

Morrissey v. Travelers Protective Ass'n, 122 Neb. 329, is cited in support of the theory that this court laid down the contrary rule, but upon strict analysis that case can be easily distinguished from the instant one. In that case the evidence showed that the application was made out by the insured, who made a false answer as to his eyesight. In the application the insured was asked the question: "Is your eyesight impaired?" to which he wrote the answer "No." The evidence showed that at the time his eyesight was impaired, of which fact he was aware, and the injury for which he complained was sustained because of his inability to see properly. We see no reason why any distinction should be made between a case where the agent of an insurance company takes it upon himself to answer the questions intended for the applicant and writes an incorrect answer therein, without the applicant having made any statement in connection therewith, and without his knowledge, and one where the applicant gave the correct answer, and the agent inserted an incorrect one.

If the question of whether the agent wrote into the application an answer different from that given him by the applicant is a question of fact for the jury to determine, then it must follow that, where no question is asked the applicant, but the agent assumes the responsibility of answering the question himself, and answers it falsely, is likewise a question of fact for the jury.

In the case of *Busboom v. Capital Fire Ins. Co.*, 111 Neb. 855, it was held that, where the question in the application for insurance was answered correctly by the applicant, but falsely inserted by the agent, and the applicant did not consent to or know of the misstatements, the insurance company was liable on the policy. It is true the above case involved a fire insurance policy, yet the defense was fraud and misrepresentation, the same as in the instant case. We are aware of no sound reason why we should differentiate between the two classes of insurance where the same defense is relied upon. In that case the court held: "The question, then, whether or not the plaintiff gave the information was one of fact for the jury, who found for the plaintiff." Also, "When the insured states the facts correctly to the company's agent, he is not bound to exercise vigilance thereafter to determine whether the agent is exercising care or good faith in his transactions on behalf of the company." The estoppel arises because the mistake or fraud was committed by the insurer's agent; the insured having acted in good faith, although, perhaps, somewhat negligently.

This complaint is not well taken. The appellant alleges fraud in order to avoid its liability under the contracts. In setting up fraud as a defense, certainly the appellee would have the right to show that no such fraud was committed. He seeks to show this, not by disputing the application that he signed, but by showing that he did not know what it contained. He made no contention that the answers to the questions in the application were incorrect; his position being, true or false, he was not responsible for them because he had no knowledge of their existence.

Should his conduct even amount to an inconsistency, such inconsistency was induced by the appellant in making the charge of fraud, and, being thus induced, it will not be permitted to complain of the result. There can be no doubt that the questions that appear in the application and the false answers thereto are material to this risk, and that the appellant would not have written the policies had it known the true condition of appellee's health, regardless of the circumstances under which they appear in this application.

Another objection is that the trial court erred in refusing to admit in evidence the medical examiner's report which contained questions and answers involving the previous health of the appellee. This report was not attached to or indorsed upon either of the policies of insurance, and was excluded by the trial court. These policies each contain the following:

"This policy and the application, a copy of which is indorsed hereon and made a part hereof, constitute the entire contract between the parties * * * and no such statement shall be used in defense to a claim under this policy, unless contained in the application, and unless a copy of such application shall be indorsed hereon or annexed hereto when issued."

Subdivision 2, sec. 44-604, Comp. St. 1929, requires that the policy contain "a provision that no statement made by the applicant for insurance, which statement is not incorporated in or indorsed on the policy issued to such applicant, shall void the policy or be used in evidence." The statute is clear and free from ambiguity. Its obvious object is to promote a uniformity in life insurance contracts. No statement, unless attached to the policy, can become competent evidence in a suit thereon or be used to avoid liability thereunder. The medical examiner's report, not meeting the requirements of the statute, was not admissible in evidence, and the trial court was correct in excluding the same.

Claim is also made that the trial court erred in giving

instruction No. 2. By this instruction the court, in defining the issues, gave to the jury what the defense was, and in so doing paraphrased the allegations of defendant's answer. It was substantially the same language embodied in this instruction that the defendant relied upon as a defense in the case. If such language were proper to plead a defense, we observe no impropriety when the court told the jury, in substance, what the defense was by making use of almost the exact language. This contention is without merit.

Appellant also complains that the evidence fails to show a disability contemplated by the policy agreements. There is no charge made that the instruction of the trial court telling the jury what condition of health would amount to a disability under the contracts is erroneous. Under the instruction of the court upon this point, which we must conclude correctly states the law, the evidence is sufficient to support the verdict.

Except for the isolated instance herein discussed, we find no place where the appellant attempts to challenge the correctness of the trial court's instructions; but it seems willing to content itself mainly by asking the court to reverse the findings of the jury under the disputed evidence and substitute an opposite conclusion. In view of what has been said heretofore, this we cannot do. The writer of this opinion, having approved the first opinion in this case, makes no attempt herein to avoid his share of the responsibility for so doing. The former opinions are withdrawn, the reversal set aside, and the judgment of the district court is

AFFIRMED.

PAINE, J., dissenting.

Two opinions have been heretofore adopted by a majority of the court in this case. The writer of this dissent respectfully dissents from this third opinion. The first is found in 126 Neb. 514, and the second in 127 Neb. 724. Each of these opinions reversed the judgment of the

trial court on the ground that untrue answers, if proved to be knowingly made by the insured, would avoid the contract.

What will be the effect of this third opinion just adopted? If this insured was 24 years of age at the time of trial in 1931, and if his expectancy was 39 years, as shown in the mortality table in our statute, and if he is to be paid $100 a month on this disability rider during his expectancy, it will amount to $46,800, during which 39 years, under a provision in the rider, he is also to be relieved of paying further premiums upon these two $5,000 policies, of $94.50 each per year, and also the premiums of $12.50 upon each rider, consisting of $7.50 for total disability and $5 for double indemnity in case of accidental death, making a total of $107 upon each policy, or $214 for 39 years, or $8,346, and pay upon his death at the end of his expectancy $10,000 more, or a grand total of $65,146 worth of benefits going to the insured under this third decision, without obligation on the part of the insured of paying another cent to the defendant company.

As set out in the second opinion in the case at bar (127 Neb. 724) the insured signed an application stating that he had never had a serious illness in his life, or been afflicted with tuberculosis, although prior thereto he had been unable to work at times with the swelling in his scrotum, which had been drained many times, and finally his left testicle had been removed, because it was tubercular, just 5 months and 20 days prior to signing such application and making such answers. The insured testifies that he never knew that these answers were written in his application, and denied that he had been told that his trouble was tuberculosis of the testicles. In other words, the insured wins a verdict on the theory that his own statements were true and honest, and that all other witnesses who disagree therewith are fabricating a story. The agent positively swears he asked the insured every question, and that the answers were written down in the application exactly as given him by the insured. The

doctor testifies that insured's testicle was tubercular, and he told him so. There is no fact or circumstance in the evidence or the exhibits introduced which reflects against the testimony of the agent or the doctors, but, on the other hand, everything strongly supports their evidence in every particular.

The medical examiner positively swears that he asked the insured each question and wrote down the answers which the insured gave him. Insured, on the other hand, says that none of the questions in the medical examiner's report were asked him, and none of the answers were written in by him, or with his knowledge or consent. For the insured to expect one to believe that he did not give the medical examiner the facts relating to the members of his family tree and their diseases and ages at death, as well as all the other answers therein, is placing a heavy burden on judgment and common sense.

A copy of this application, with appropriate answers filled in in more than 30 blank spaces, was attached to and became a part of each policy. Admitting, just for the sake of argument, that insured's testimony was true, and that the agent filled in all these answers, including those which were false, without the knowledge of insured, and that he signed his name with his eyes shut, yet the law places a burden upon the insured for fair dealing.

When he received these policies, with the application a part thereof, the United States circuit court of appeals said that retention of it constitutes an adoption of the representations made in the application. *Taylor v. American Liability Co.*, 48 Fed. (2d) 592. Also see *New York Life Ins. Co. v. Goerlich*, 11 Fed. (2d) 838.

In a case where a son, Louis, had secured life insurance upon his illiterate father, Jacob, by false representations in the application as to his age, his health, and concealed his rejection by other companies, the Michigan court said: "It was Jacob's duty to know that the representations therein contained, and which constituted the inducement for the issuance of the policy, were true, and his silence

during the life of the policy is persuasive proof of a fraudulent intent." *Metropolitan Life Ins. Co. v. Freedman,* 159 Mich. 114.

In *Mutual Life Ins. Co. v. Hilton-Green,* 241 U. S. 613, we find this statement of the law: "Material representations in an application for life insurance which are incorrect, if known to be untrue by the assured when made, and nothing else appearing, invalidate the policy issued by the insurer relying on such representations, without further proof of actual conscious design to defraud. * * *

"Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties. * * * Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner and the trial court should have directed one in its favor."

In *Morgan v. United Benefit Life Ins. Co.,* 123 Neb. 47, Judge Fred Wright used this language in the text: "The rule that, where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside has been so long recognized and is so well established in this state that it needs no citation of authorities to sustain it; and on the trial of the cause in the district court, where only one conclusion can be drawn from the evidence, the question becomes one of law, and the court should direct a verdict. *Brown v. Swift & Co.,* 91 Neb. 532; *Baker v. Swift & Co.,* 77 Neb. 749; *Kelly v. Wehn,* 111 Neb. 446; *Sindelar v. Hord Grain Co.,* 116 Neb. 776." And in paragraph 2 of the syllabus Judge Wright said: "Where only one conclusion can be reasonably reached from the evidence, the question becomes one of law, and it is the duty of the trial court, upon

request to that effect, to direct a verdict accordingly." See, also, *Nelson v. Nelson,* 95 Neb. 523; *Lee v. Hildebrand,* 119 Neb. 717; *Lebs v. Mutual Benefit Health & Accident Ass'n,* 124 Neb. 491.

In my humble judgment, this third opinion does violence to the facts and results in a miscarriage of justice.

CARTER, J., dissenting.

It is quite apparent that the questions appearing in the application for insurance and the false answers thereto are material to the risk. They call for statements of fact that could have been definitely answered. They are of such a nature that a false answer implies fraud and constitutes the answers as warranties as distinguished from representations. If true answers had been shown on the application, the insurance would not have been written. The false answers are such that if made by the insured they render the policies void.

At the time the policies were taken out by the insured, he was 21 years of age. He had attended school until he had completed one year in high school. He testified on the stand he knew that insurance policies were issued in part on the statements made by the insured as to the previous good health of the applicant. He vigorously denied in his examination in chief that he knew he was afflicted with tuberculosis of the testicles on the occasions he made application for and was examined for the insurance. In his rebuttal testimony, he finally admitted that he knew this fact many months before. He testified that he did not make the answers that show in the application, that they were written in without his knowledge and that he signed the statement without reading or examining the same. The agent who took the application testified that each question was asked and the answer correctly inserted in the application. The medical examiner stated that he asked each question of the insured and that the answer was correctly inserted in the medical report. The insured denies this. There are answers contained in the application, the truth of which is not

disputed, the information for the making of which the insured must have provided. Other physicians testified that they informed the insured of his tubercular condition before the date of the application. The application was short and could have been examined in a very few minutes to determine its correctness. Although the insured knew this information was to be used as a basis for the issuance of the policies, he says he paid no attention to the contents of the application before he signed it. It is a needless waste of space to repeat all of the evidence which to my mind clearly indicates an intent to defraud the insurance company. The majority opinion is based on the theory that the evidence is conflicting, the jury properly instructed, and the verdict of the jury therefore final.

In my opinion, the verdict of the jury is so clearly against the weight of the evidence that it should be set aside. That the insured intended from the very beginning to conceal material facts in order to obtain this insurance is to me very apparent from the record. Only one conclusion can reasonably be reached from this evidence, and that is a verdict for the defendant. The trial court should have directed a verdict for the defendant at the close of all the evidence.

To permit one interested witness to come into court and successfully dispute several reputable witnesses and the facts contained above his own signature will certainly open the door to many frauds of like nature in the future. No new principles of law need be invoked to warrant a reversal of this case. It has always been the law of this state that where a verdict is against the clear weight of evidence, so that it cannot be sustained on any principle of right and justice, it becomes the duty of the court to set it aside. It then becomes a matter of law for the court, and not a matter for the jury to consider along with possible sympathy, speculation or prejudice as appears to have been the case in the suit at bar. But for the opinion of the majority of the court, I would not

hesitate to say that any reasonable person would conclude, after reading the record, that the judgment of the trial court was clearly against the great weight of the evidence.

GENERAL CREDIT CORPORATION, APPELLEE, V. NORMA LEE MOORE ET AL., APPELLANTS.

FILED MAY 1, 1935. No. 29231.

1. **Principal and Agent**: UNAUTHORIZED CONTRACTS: RETENTION OF BENEFITS. "A principal cannot knowingly retain the benefits accruing from the unauthorized act of his agent and escape the legal obligations, assumed by the agent in the name of the principal, from which the benefits accrue." *Furrer v. Nebraska Bldg. & Investment Co.*, 111 Neb. 423.
2. ———: ———: ———. A principal who accepts the fruits of a contract made by an agent in excess of his authority is liable to the person with whom such contract is made, if he had full knowledge or was put on inquiry from which he could have obtained full knowledge.
3. ———: ———: RATIFICATION. Ratification by the principal of the unauthorized act of his agent has the same effect as prior express authority, and generally relates back to the time when the unauthorized act was done.
4. **Gifts**. A donor may not give away the interest of a third party in property.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Robert Huston, for appellants.

O. A. Drake, contra.

Heard before GOSS, C. J., GOOD, DAY, PAINE and CARTER, JJ., and LOVEL S. HASTINGS and LIGHTNER, District Judges.

LIGHTNER, District Judge.

Replevin for a Chrysler automobile. Plaintiff claims that it has a special interest by reason of a chattel mortgage given to the vendor and assigned to plaintiff. On default

in payments plaintiff elected to declare the whole amount due and brought this action. A jury was waived. Finding and judgment were for plaintiff, and defendants appeal.

The defendants are husband and wife. Elmer T. Moore, the husband, carried through all the negotiations in the purchase of the car. He gave therefor an old Dodge which he owned, his note for $182, to which he also signed his wife's name, and the note and chattel mortgage for the balance which are the subject of this dispute. He did not sign his own name to this note and mortgage, but his wife's name only. It is now claimed that he did not have authority to do so.

The grounds upon which the district court found in plaintiff's favor do not appear, but probably upon the theory that Mrs. Moore ratified the transaction. In support of this theory it appears from the record that Mr. and Mrs. Moore immediately prior to the purchase rode in the car with the salesman, at which time the qualities of the car and payments were discussed; that immediately after the sale the bill of sale to Mrs. Moore was sent to her which apprised her, so she says, that it was her car; that immediately after it purchased the paper plaintiff sent a notice to Mrs. Moore, and the day after the first payment was due it sent a past-due notice to her, a letter or two, wired and telephoned and got no response. The chattel mortgage was duly filed in the county clerk's office of the county of Mrs. Moore's residence in accordance with section 36-301, Comp. St. 1929, several days after the sale. It further appears that, regardless of these facts, which would bring home to Mrs. Moore that the sale was to her and that the purchase price had not been paid and that plaintiff was insisting on payment from her, Mrs. Moore continued in the possession and use of the car. It can certainly not be held, in view of these facts, that a finding that Mrs. Moore ratified the transaction is not supported by the evidence.

"A principal who accepts the fruits of a contract made by an agent in excess of his authority is liable to the person with whom such contract was made, although misinformed as to some of its provisions." *Brong v. Spence,* 56 Neb. 638.

"A principal cannot knowingly retain the benefits accruing from the unauthorized act of his agent and escape the legal obligations, assumed by the agent in the name of the principal, from which the benefits accrue." *Furrer v. Nebraska Bldg. & Investment Co.,* 111 Neb. 423. See *Dinsdale v. Sprague Tire & Rubber Co.,* 110 Neb. 290; *Moller v. Mallory,* 110 Neb. 269; *Stanton Nat. Bank v. Swallow,* 113 Neb. 336.

"Ratification by the principal of the unauthorized act of his agent has the same effect as prior express authority." *Furrer v. Nebraska Bldg. & Investment Co., supra.* And generally relates back to the time the unauthorized act was done. 2 C. J. 516.

It seems to be Mr. Moore's theory that he bought the automobile and gave it to Mrs. Moore. It is true that he turned in his 1929 Dodge at $600 and gave another note of $182 secured by a second mortgage on the Chrysler, to which note and mortgage he signed both Mrs. Moore's name and his own. However, he could only give away that which he had. 28 C. J. 644; *Fischer v. Union Trust Co.,* 138 Mich. 612.

"A person is required to be just before he may be generous, and gifts will not be permitted to stand when the rights of third persons are thereby infringed." 28 C. J. 655.

"In a conflict between two titles emanating from the same source, the one being a gift and the other a purchase for value without notice of the other, the purchase will prevail, although it is subsequent to the gift. *Bell v. McCawley,* 29 Ga. 355." 28 C. J. 655, note 44 (a) (1).

We are familiar with the rule that an agent who does not purport to bind himself personally by signing his principal's name to an unauthorized contract does not

generally become personally liable on the contract, but only in an action in deceit. *Brong v. Spence, supra; Cole v. O'Brien,* 34 Neb. 68, 33 Am. St. Rep. 616; 2 C. J. 806.

The rule is far from universal and there are many exceptions to it. See 2 C. J. 806. But to hold that the chattel mortgage was invalid because Mr. Moore did not have authority to sign Mrs. Moore's name to it, and invalid as to him because it did not purport to bind him, and that he could then give the car to Mrs. Moore free of the mortgage, would be to permit Mr. Moore to profit by his own wrong, a thing which the law will not permit him to do. If it can be said that he purchased the car himself and let the title go to her because he wanted to make her a gift, the above rule in regard to gifts applies; that is, that he could give away only that which he had, and he could not acquire the whole title free of liens by the simple expedient of signing some one else's name to the papers which represented the transaction. What he had at the close of the transaction if he was the principal and put the title in his wife's name because he intended to give it to her was a Chrysler subject to the mortgage against it, and such was all he could give to her. But if it be contended that he bought the car directly for her and that the title went to her at once, then he was her ostensible agent, and the mortgage is good, on account of the facts above recited, by ratification. In fact, we fail to see any ground by which an attempt of this kind can be sustained. Even if Mrs. Moore thought the car had been paid for in full and knew none of the facts that were brought to her attention, she cannot hold it against the mortgage. She does not occupy the favorable position of an innocent purchaser, gave nothing, and cannot profit by the wrongful act of her husband.

In a recent Florida case, *Intertype Corporation v. Pulver,* 101 Fla. 1177, it was held:

"Incapacity of an agent to execute a purchase-money mortgage is insufficient by way of defense to the foreclosure of such mortgage, when the purchaser seeking to

interpose such defense still retains possession of the property. Wiltsie, Mortgage Foreclosure (4th ed.) sec. 199.

"It is an established principle of law that when a person acts for another who accepts the fruits of his efforts, the latter is deemed to have accepted the methods employed, and he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the means by which they were acquired"—citing Florida cases and 21 R. C. L. 932, sec. 111; 1 Mechem, Agency (2d ed.) 316.

Defendants rely on rules and illustrations found in Restatement, Law of Agency. A careful examination of chapter 4, "Ratification," secs. 82 to 104, is, it seems to us, unfavorable, rather than favorable, to defendants' contentions. The rule laid down in section 98 is: "The receipt by a purported principal, with knowledge of the facts, of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance." It is stated further in sections 98 under comment b: "The receipt of benefits by the purported principal without knowledge of the transaction between the purported agent and the third person or without knowledge of other material facts does not constitute affirmance." It is under comment b that the illustration quoted and relied upon by defendants is found: "3. Without power to bind P thereby, A purports to purchase an automobile from T on P's credit. Without knowledge of the transaction, P receives the car as a gift from A. There is no affirmance thereby." However, it is said just before the illustration and as part of the comment: "The rule applicable where the purported principal later acquires knowledge and fails to return the things or their value is stated in section 99." And the rule laid down in section 99 is as follows: "The retention by a purported principal, with knowledge of the facts and before he has changed his position, of something which he is not entitled to retain unless an act

purported to be done on his account is affirmed, and to which he makes no claim except through such act, constitutes an affirmance."

Illustration 1 from section 94, also quoted and relied on by defendants, does not apply, since that was a case where the agent, without power to bind the principal, bought goods for the principal and paid the purchase price out of his own money. The contest evidently was between the agent and the principal, and it does not appear from the illustration that the principal with knowledge of the facts accepted and retained the goods. He simply learned that the alleged agent had purchased the goods and did nothing.

There are many distinguishing features between this case and the case of *Rust-Owen Lumber Co. v. Holt*, 60 Neb. 80, and the other cases cited by appellants. In the *Rust-Owen* case the material for the dwelling-house which was constructed on the wife's lots was in the first instance sold to the husband on his personal account, and not as the agent of the wife. In discussions of the matter between the husband and wife, it was understood that he was to pay for the material necessary for the building by working at his trade. The public records showed that the lots stood in the wife's name. There is the further thought that the completed building could not very well be turned back, and the foreclosure of the mechanic's lien might lose to the wife, not only that which she obtained by the husband's unauthorized act, but her own lots as well. Furthermore, it will be noted from the discussion near the close of the opinion that, if the lower court had held that to take possession of the building after it was completed and live in it constituted a ratification, the supreme court would probably have affirmed such holding. All the court held was that the occupancy by the wife with her husband of a building constructed by the husband on the wife's land as a family residence did not raise a conclusive presumption of ratification of the husband's acts, so as to make

effective a mechanic's lien, where none theretofore legally attached; that, at most, it was only a circumstance to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification. Another distinguishing fact referred to in the opinion is that it is the duty of the husband to furnish a home, and that the wife might assume that in building the dwelling-house he was doing so in fulfilment of such obligation. But there is no duty, we believe, to furnish an automobile, especially not a Chrysler when they already had a Dodge.

The question of the wife's personal liability is not presented, the car having been sold for more than this note.

This is a law action, and the finding of the lower court, if there is sufficient evidence to sustain it, has the same conclusive effect as the finding of a jury. There is ample evidence to sustain the judgment of the lower court, and the judgment is

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18. Provision of mortgage agreement precluding a bondholder from accelerating maturity date of bond for nonpayment of interest unless trustees had refused to take action on request of holders of 25 per cent. of outstanding bonds *held* reasonable, and, when not complied with, precludes bondholder's action to recover principal. *Munch v. Central West Public Service Co*..... 645

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1. Where an architect was employed to make plans and specifications for and supervise construction of a courthouse for an agreed commission on its cost, and architect was paid his commission therefor, county *held* not liable for further commission for future alterations. *Berlinghof v. Lincoln County*..... 28
2. A county board cannot bind the county to pay for services to be rendered or paid for at some future undetermined date. *Berlinghof v. Lincoln County*..... 28
3. A county board cannot levy taxes to pay expenses of subsequent years nor contract with reference to levies of subsequent years, unless authorized by the electors. *Berlinghof v. Lincoln County*..... 28

4. Where a county agrees to and does pay an architect a commission on the cost of a new courthouse for preparing plans and specifications, it will be presumed, after a lapse of four years, that there was complete fulfilment of the agreement. *Berlinghof v. Lincoln County* 28

Courts.

1. In the interpretation and administration of a federal statute, applicable opinions of the federal courts are binding on state courts. *Sullivan v. Chicago & N. W. R. Co.* 92
2. The United States supreme court's interpretation of federal statute controls in actions in state courts arising under such statute. *Lenz v. Union P. R. Co.*..... 99
3. The term "proceeding," in sections 20-852, 20-853, Comp. St. 1929, includes the filing of an appeal bond to obtain review of judgment of county court in a probate proceeding, and the right to amend such bond is within the purview of said sections. *In re Estate of Hoagland* 219

Criminal Law.

1. Petition in error must be filed within three months after rendition of final judgment. *Dimmel v. State*..... 191
2. The legislature may limit time within which appeal may be taken, and the trial court may not extend the time by vacating and reentering the same judgment. *Dimmel v. State*..... 191
3. The trial court may set aside a judgment during the term. *Dimmel v. State*..... 191
4. Appellate court will disregard theory in defense not supported by evidence. *Boggs v. State*..... 427
5. Where one charged with embezzlement admits intent, he will not, in appellate court, be heard to deny that intent was proved. *Boggs v. State*..... 427
6. The trial court has discretion to grant or refuse permission, pending trial, to make a test or experiment before the jury for purpose of using result in evidence. *Dean v. State*..... 466
7. Argument by counsel will be presumed not prejudicial, where argument does not appear in the record. *Dean v. State* 466
8. To review order rejecting evidence, there must be an offer of proof of the facts sought to be put in evidence. *Dean v. State*..... 466

9. That a single clause of an instruction is incomplete will not warrant reversal if meaning of entire paragraph is clear. *Rivette v. State* 476
10. Instructions should be construed together and if, when considered as a whole, they correctly state the law, it is sufficient. *Rivette v. State* 476
11. Refusing instructions warranted by the evidence and correctly stating the law constitutes error, unless the law involved is covered by other instructions. *Goldman v. State* 684
12. It is improper for trial judge to support his rulings on objections to evidence by making significant remarks in reference to evidence to the jury. *Goldman v. State* 684
13. The proper method of incorporating journal entry into transcript in proceedings in error from county court to district court is to have journal entry first entered in county court and then included in transcript or in supplemental transcript. *Sinner v. State* 759
14. Where the jury may find from the evidence that a witness has wilfully testified falsely on a material issue, refusing a requested instruction that, if the jury so find, testimony of such witness on other material matters may be disregarded, constitutes error. *Joseph v. State* 824
15. Defendant complaining of trial court's refusal to give instruction based on maxim *falsus in uno, falsus in omnibus,* must indicate testimony requiring it. *Joseph v. State* 824
16. Evidence *held* to require giving of instruction authorizing the jury to disregard testimony of any witness who they believe had testified falsely. *Joseph v. State* 824

Crops.

Annual crops on the land do not pass to the purchaser at judicial sale but are regarded as personalty for the purpose of saving the debtor's rights thereto. *Jensen v. Gurley Grain Co* 266

Damages.

1. In a personal injury action, an instruction permitting the jury to allow damages for future pain and suffering which has not been proved with reasonable certainty is prejudicially erroneous. *Jensen v. Omaha & C. B. Street R. Co* 21
2. Verdict of $5,500 for dislocated knee *held* not excessive. *Oliver v. Nelson* 160

Deeds.

1. A quitclaim deed conveying corporation's interest in premises did not convey any interest held by corporation as trustee for another. *Kennedy v. Potts* 213
2. It is within the trial court's discretion to determine whether evidence respecting undue influence is too remote to be received. *Hartford v. Pinnie* 771
3. Where heirs of deceased seek to vacate a deed for undue influence, evidence that grantor had frequently expressed intention of giving the property to grantee *held* admissible to refute charge. *Hartford v. Pinnie* 771
4. A deed, if it is not voluntary, may be impeached for fraud or mistake. *Oft v. Ohrt* 848
5. Parol testimony is competent to reform a deed so as to make it conform to agreement of parties. *Oft v. Ohrt* 848
6. A conveyance is not voluntary when it is supported by a valuable consideration. *Oft v. Ohrt* 848

Descent and Distribution.

The county court in settlement of an estate has jurisdiction to determine heirship, although the determination may incidentally involve a question of title. *Billiter v. Parriott* 238

Dismissal and Nonsuit.

1. Final submission of an action contemplates submission on both law and fact. *Plattsmouth Loan & Bldg. Ass'n v. Sedlak* 509
2. Plaintiff's dismissal of action pending time fixed by court for filing briefs *held* proper as having been dismissed before final submission. *Plattsmouth Loan & Bldg. Ass'n v. Sedlak* 509
3. Plaintiff has right to dismiss his action before final submission of cause, subject to compliance with conditions imposed by the court. *Plattsmouth Loan & Bldg. Ass'n v. Sedlak* 509
4. Plaintiff's right to dismiss his action before final submission does not control defendant's right to trial of a set-off or counterclaim. *Plattsmouth Loan & Bldg. Ass'n v. Sedlak* 509
5. Dismissal is not demandable as a right after cause has been fully tried and unconditionally submitted to the court. *Pettegrew v. Pettegrew* 783

Divorce.

1. Monthly payments for support of children are subject to modification on proof of changed conditions. *Turco v. Turco* 50

2. Evidence *held* to sustain conviction for failing to make payments provided by divorce decree for support of children. *Ruhl v. State* 105
3. Where a wife is granted a divorce, the court may allow her attorney's fees. *Beatty v. Beatty* 258
4. Wife accepting payment of part of allowance in divorce decree could not appeal from remainder of decree. *Larabee v. Larabee* 560
5. The court will consider the child's welfare in awarding its custody. *Hobza v. Hobza* 598
6. Father *held* entitled to custody of daughter, rather than maternal grandparents. *Hobza v. Hobza* 598
7. After trial of husband's cross-action for divorce, unconditional submission of cause and announcement from the bench that charges against wife were not proved, dismissal of cross-action without prejudice constituted abuse of discretion. *Pettegrew v. Pettegrew* 783

Embezzlement.

Taking shares of stock from owner with expressed purpose of exchanging them for other shares, but with undisclosed purpose of converting them to taker's use, *held* within definition of embezzlement. *Boggs v. State* 427

Equity.

1. A court of equity is bound by an explicit statute or rule of law. *State, ex rel. Sorensen, v. State Bank of Omaha* 148
2. Where no equitable relief is granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action. *Reynolds v. Warner* 304
3. Where plaintiff's petition shows apparent laches on its face, he must generally excuse delay by proper allegations and must support such allegations by proof. *Baxter v. National Mtg. Loan Co.* 537
4. When suit is brought after time fixed in analogous statute, plaintiff must plead and prove that laches does not exist. *Baxter v. National Mtg. Loan Co.* 537
5. A court of equity may, in the exercise of its inherent powers, refuse relief after undue and unexplained delay, and when injustice would result. *Barger v. City of Tekamah* 805

Estoppel.

The fact that a legatee became witness for contestants who promised legatee amount of bequest if the will were denied probate *held* not to bar legatee's recovery

under will when admitted to probate. *In re Estate of Kierstead* 654

Evidence.

1. A verdict may not rest on mere conjecture or speculation. *Peabody v. Continental Life Ins. Co*..... 23
2. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption. *Peabody v. Continental Life Ins. Co*..... 23
3. Under the law of Iowa, parol evidence is inadmissible to prove the meaning of terms of an unambiguous written contract. *Lawrence v. Equitable Life Ins. Co*..... 72
4. Evidence *held* to furnish sufficient foundation for admission of minutes of corporate meetings. *Masonic Bldg. Corporation v. Carlsen*..... 108
5. Minutes of corporate meetings *held* competent to show method of transacting business. *Masonic Bldg. Corporation v. Carlsen*..... 108
6. Officer of trust corporation *held* competent to give expert opinion as to fair market value of securities. *Masonic Bldg. Corporation v. Carlsen*..... 108
7. Former evidence of a party to an action against his own interest on a material matter is admissible against him as original evidence. *Luikart v. Korbmaker*..... 199
8. A nonexpert witness who had an extended intimate acquaintance with maker *held* qualified to express opinion as to maker's mental capacity to execute a note, where witness had given facts and circumstances on which opinion was based. *In re Estate of Bartmess* 408
9. Parol evidence *held* inadmissible to prove an advancement. *Stark v. Stark*..... 524
10. Depositions taken in an action may be admissible in a subsequent action involving the same issues and between the same parties. *Hartford v. Pinnie*..... 771

Execution.

1. Order of confirmation adjudicates sufficiency of publication of notice of sale on execution. *Fisher v. Kellogg* 248
2. Title to property purchased at execution sale cannot be collaterally questioned in another action, though publication of notice of sale was insufficient. *Nipp v. Puritan Mfg. & Supply Co*..... 459

Executors and Administrators.

1. In a proceeding to settle an estate, evidence supporting claims of decedent's daughter for unpaid share of the estate and for compensation for services as nurse in

caring for decedent, *held* insufficient to make *prima facie* case. *In re Estate of Benson* 138
2. The county court, in probate matters, is a court of general jurisdiction, and its judgment rendered in settlement and distribution of an estate made on proper notice is final unless set aside on appeal. *Billiter v. Parriott* 238
3. County court's judgment that surviving spouse has elected to take under the law of descent cannot be collaterally attacked on the ground that the election did not comply with statutory requirements. *Billiter v. Parriott* 238
4. Meaning of "good cause," as employed in statute of nonclaim, depends on the circumstances of each case. *In re Estate of Tucker* 387
5. Evidence *held* to establish "good cause shown" entitling applicant to additional time for filing claim against estate. *In re Estate of Tucker* 387

False Pretenses.

Offense of obtaining money by false pretenses has not been committed where owner investigates representations and parts with money relying on result of investigation. *Goldman v. State* 684

Fines.

1. The term "fine" is a pecuniary punishment imposed by a lawful tribunal on a person convicted of crime or misdemeanor. *Sinner v. State* 759
2. Sentence of "fine" of 60 days in county jail *held* ambiguous and inaccurate, and district court, on proceedings in error, should have reversed the judgment, with directions to county court to resentence defendant. *Sinner v. State* 759

Forcible Entry and Detainer.

1. Forcible entry and detainer lies to determine right to possession of land, but not title thereto. *Miller v. Maust* 453
2. Action of forcible entry and detainer is predicated on unlawful and forcible entry and detention to which ownership or a possessory right is not a defense. *Miller v. Maust* 453
3. Character of entry and detention is test of plaintiff's right to recover in an action of forcible entry and detainer. *Miller v. Maust* 453
4. The statute giving justices of the peace jurisdiction of forcible entry and detainer actions was intended to

prevent even rightful owners of realty from recovering by violence what they could obtain from the court. *Miller v. Maust* 453
5. A person claiming paramount title to realty in possession of another cannot, by surreptitiously obtaining possession thereof, place the former possessor at any disadvantage in assertion of his rights or enforcement of his remedies in respect thereto. *Miller v. Maust* 453

Fraud.
1. Fraud perpetrated by creditors in making collections from debtors, if resulting in pecuniary damage to an innocent third person, may be pleaded and proved by the latter as an actionable wrong. *Naeve v. Shea* 374
2. Fraud is never presumed, but must be clearly proved. *Krelle v. Bowen* 418
3. Party fraudulently induced to enter into contract may affirm contract and sue for damages, or set up damages by way of defense or counterclaim. *Rankin v. Bigger* 800

Fraudulent Conveyances.
1. A father's conveyance of all his property to his daughter in consideration of his future support is void as to his creditors. *Luikart v. Korbmaker* 199
2. Grantor's administrator cannot successfully prosecute an action to vacate a voluntary conveyance, in absence of showing that indebtedness of grantor existed at time of conveyance, or that it was made in contemplation of future liability and for the purpose of defrauding prospective creditors. *Hartford v. Pinnie* 771

Gifts.
1. What constitutes a valid gift *inter vivos* stated. *Johnson v. Omaha Loan & Bldg. Ass'n* 37
2. A donor may not give away interest of third party in property. *General Credit Corporation v. Moore* 881

Guaranty.
Guaranty *held* to constitute an absolute contract on lawful consideration that money expressed in note should be paid at maturity. *Bain v. King* 682

Guardian and Ward.
1. A guardian has no authority to sell personalty or invest ward's funds without an order of the county court. *Wilkins v. Deal* 78
2. Where a county court directed a guardian to give another bond because of insolvency of surety on existing

bond, new bond *held* to be an additional bond, and surety thereon *held* liable for guardian's defalcation before new bond was given. *Wilkins v. Deal* 78
3. An action cannot be maintained on a guardian's bond until ascertainment of amount due on settlement of the guardian's final account. *Wilkins v. Deal* 78
4. The amount found due on settlement of the guardian's final account is conclusive on the sureties on his bond. *Wilkins v. Deal* 78
5. Guardian and surety on his bond are liable for amount of funds of ward invested by guardian without authority of county court. *Wilkins v. Deal* 78
6. The duty devolves on a subsequent surety to ascertain the condition of the ward's estate before binding himself as surety on guardian's bond. *Wilkins v. Deal* 78

Homestead.

1. Any interest in land, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein. *Fisher v. Kellogg* 248
2. An estate in remainder, whether vested or contingent, will not support a claim of homestead exemption until termination of the prior estate. *Fisher v. Kellogg* 248
3. Estate in remainder *held* subject to sale on execution. *Fisher v. Kellogg* 248
4. A 160-acre tract of land cannot be occupied by two families so that each will have a homestead right thereto. *Luenenborg v. Luenenborg* 624
5. Father *held* to have a homestead right to 160-acre tract of land, notwithstanding his son rented and lived with his family on part of the land. *Luenenborg v. Luenenborg* 624
6. As between mortgagor and mortgagee, "homestead" means the actual home of mortgagor's family. *First Trust Co. v. Bauer* 725

Homicide.

1. Where two or more conspire to commit an unlawful act and in its prosecution one of the confederates commits homicide, all are guilty. *Dean v. State* 466
2. In prosecution for murder, instruction submitting theory that defendant and his companions were traveling together with a common criminal design in fleeing from and shooting at police officers *held* justified under the evidence. *Dean v. State* 466
3. Refusal to instruct on the law applicable to manslaugh-

ter *held* not error in a prosecution for murder in first degree, where the evidence conclusively establishes that necessary elements of crime of manslaughter do not exist. *Dean v. State* 466
4. Evidence *held* to sustain conviction for murder in first degree. *Dean v. State* 466

Husband and Wife.

1. Extension of time of payment of husband's past-due indebtedness is sufficient consideration to support wife's contract to bind her separate estate for payment thereof. *Gibson v. Sheen* 728
2. Wife *held* bound by chattel mortgage on automobile signed in her name by husband. *General Credit Corporation v. Moore* 881

Indictment and Information.

1. An information alleging facts necessary to constitute a statutory offense is sufficient. *Trosper v. State* 165
2. Full text of information must be considered in its ordinary sense to determine what crime, if any, has been charged. *Galloway v. State* 429

Injunction.

To obtain injunctive relief, facts must be alleged from which inadequacy of legal remedy is apparent. *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck* 13

Insurance.

1. Natural love of life raises a presumption, in absence of evidence to the contrary, that insured did not commit suicide, but this presumption is rebuttable. *Peabody v. Continental Life Ins. Co* 23
2. Lack of motive is a circumstance to be considered in determining whether insured committed suicide or died from accidental cause, but proof of motive is not essential to sustain a finding of suicide. *Peabody v. Continental Life Ins. Co* 23
3. The rule that ambiguous terms of an insurance contract should be construed in favor of insured does not justify imposing insurance risks not assumed. *Himelbloom v. Metropolitan Life Ins. Co* 52
4. In construing an insurance contract, pertinent provisions of the entire instrument should be considered. *Himelbloom v. Metropolitan Life Ins. Co* 52
5. Insurer's agreement to waive premiums on policy in event of total and permanent disability of insured may

be made to depend on continuance of that condition for six months. *Himelbloom v. Metropolitan Life Ins. Co.* 52
6. Under the law of Iowa, a life policy providing for total and permanent disability benefits does not permit recovery for disability total for years but which has terminated at the time action for recovery is instituted. *Lawrence v. Equitable Life Ins. Co.* 72
7. The natural and obvious meaning of an insurance policy controls, rather than a forced or strained construction. *Davis v. Aetna Life Ins. Co.* 154
8. Provision in policy that six months after proof is furnished insurer of insured's permanent total disability insurer will waive premiums and pay $10 monthly thereafter during disability construed as applicable to date of proof, rather than date of disability. *Davis v. Aetna Life Ins. Co.* 154
9. In case of doubt, a policy will be liberally construed in favor of insured. *Oswald v. Equitable Life Assurance Society* 173
10. "Total disability," preventing insured from pursuing a gainful occupation, exists when insured is unable to perform the substantial duties of a given occupation. *Oswald v. Equitable Life Assurance Society* 173
11. To create contract of insurance, a policy need not be actually issued and delivered to insured. *Kearney County Farmers Mutual Ins. Co. v. Howard* 179
12. Evidence *held* to establish contract of insurance. *Kearney County Farmers Mutual Ins. Co. v. Howard* 179
13. Forfeiture of a fire policy because of insured's depletion of insured property cannot be invoked as a defense unless the depletion changed identity of the property. *Leisy v. Farmers Mutual Home Ins. Co.* 278
14. The valued policy law fixes the worth of property insured conclusively at the valuation written in the policy. *Leisy v. Farmers Mutual Home Ins. Co.* 278
15. Petition to recover damages for fraud perpetrated by insurance companies *held* not demurrable. *Naeve v. Shea* 374
16. The term "household" in omnibus clause of automobile liability policy covering other members of insured's household means those who dwell under the same roof and compose a family. *Andrews v. Commercial Casualty Ins. Co.* 496
17. Evidence, in action against liability insurer by person injured as result of operation of insured's automobile

by insured's brother, *held* to sustain finding that injury was covered by policy. *Andrews v. Commercial Casualty Ins. Co*..... 496

18. In allowing attorney's fee as costs in action on liability policy, the court may consider amount involved, responsibility assumed, questions of law raised, time and labor, results of service, and professional diligence and skill. *Andrews v. Commercial Casualty Ins. Co*..... 496

19. Where a group policy of insurance on employees provides no waiting time for payment of a claim, insurance thereunder *held* due on receipt of proofs of loss by insurer. *Wheaton v. Aetna Life Ins. Co*..... 583

20. Statutory provision forbidding settlement on life policy at maturity for less than face of policy does not prevent application of amount due to a life annuity. *Greevy v. Massachusetts Mutual Life Ins. Co*..... 586

21. Evidence *held* to sustain finding that a contract for a life annuity in lieu of a lump sum payment of amount due on a life policy was not procured by fraud of insurer. *Greevy v. Massachusetts Mutual Life Ins. Co.* 586

22. An insurance contract, in case of doubt, will be liberally construed in favor of insured. *Moore v. Pacific Mutual Life Ins. Co*..... 605

23. Evidence *held* to show disability resulting in "continuous, necessary and total loss of all business time." *Moore v. Pacific Mutual Life Ins. Co*..... 605

24. Facts *held* not to constitute claim for insurance, but one for damages for negligence. *Rhoads v. Columbia Fire Underwriters Agency*..... 710

25. In determining whether a statement signed by assured to obtain revival of a life policy constituted a warranty or a representation, situation of parties, subject-matter of contract, and language employed may be considered. *Pollard v. Royal Highlanders*..... 790

26. A signed statement by assured will be held to be a warranty only when it clearly appears that such was the intention of the contracting parties. *Pollard v. Royal Highlanders* 790

27. An untrue answer in application for life insurance in reference to matters of opinion or judgment will not avoid the policy, if made in good faith. *Pollard v. Royal Highlanders* 790

28. Statement by assured as to health *held* representation, and not a warranty. *Pollard v. Royal Highlanders*.... 790

29. To defeat recovery on life policy because of false representations, insurer must prove that the representations were untrue and were made by assured knowingly

with the fraudulent intent to deceive, that they were material to the risk, and that they were relied on by insurer. *Pollard v. Royal Highlanders* 790

30. Where insurer's agent falsely answers questions in application for a life policy without applicant's knowledge, insurer will be estopped to claim that such answers were false. *Scott v. New England Mutual Life Ins. Co.* 867

31. Where statutes and policy provide that only statements contained in application attached to life policy and indorsed thereon may be used in defense of claim under policy, medical examiner's report, not contained in policy, nor attached thereto, nor indorsed thereon, is not admissible in action on policy. *Scott v. New England Mutual Life Ins. Co.* 867

Interest.

Interest on forbearance of money is governed by law in force at time claim arose. *Wheaton v. Aetna Life Ins. Co.* 583

Judges.

Judge *held* not disqualified. *Masonic Bldg. Corporation v. Carlsen* 108

Judgment.

1. A former judgment is conclusive when the parties and the question involved in both suits are the same, although the property claimed in them may be different. *Federal Trust Co. v. Baxter* 1

2. A judgment cannot be collaterally attacked unless affected by some jurisdictional infirmity. *Billiter v. Parriott* 238

3. The supreme court will not try *de novo* a litigated issue not within the pleadings. *Bowman v. Cobb* 289

4. Issues must be formed by pleadings, and judgment rendered thereon must respond thereto. *Bowman v. Cobb* 289

5. No duty rests on the court to render judgment on a litigated issue not within the pleadings. *Bowman v. Cobb* 289

6. A judgment on the merits conclusively settles, as between parties and privies, matter in issue directly adjudicated or necessarily involved in the action. *State, ex rel. Sorensen, v. Newman Grove State Bank* 422

7. A judgment against an insolvent state bank rendered prior to receivership, adjudicating that bank held certain funds deposited therein in trust, *held* binding on

receiver. *State, ex rel. Sorensen, v. Newman Grove State Bank* 422

8. Where issues and parties in separate actions were different, judgment in first *held* not *res judicata* as defense in second. *Andrews v. Commercial Casualty Ins. Co.* 496
9. Statute enumerating grounds under which judgments may be set aside after expiration of term at which judgments were rendered does not provide the exclusive remedy, but such grounds are concurrent with equity jurisdiction. *Howard Stove & Furnace Co. v. Rudolf*.... 665
10. A decree may be set aside by a court of equity after expiration of term at which decree was rendered. *Howard Stove & Furnace Co. v. Rudolf*..... 665
11. Devisees appointing a trustee who brings an action in their behalf are bound by the judgment rendered in such action. *Glissmann v. McDonald*..... 693
12. A judgment is not *res judicata* as to any fact at issue in subsequent action where neither issue nor parties are the same. *Plattsmouth Bridge Co. v. Turner*..... 738

Judicial Sales.

A judicial sale of realty will not be set aside for inadequacy of price, unless it is so gross as to show fraud or mistake. *Lewis v. Neslund*..... 98

Jury.

1. In civil actions, defendants with mutual interests are entitled to only three peremptory challenges. *Masonic Bldg. Corporation v. Carlsen*..... 108
2. The constitutional right to trial by jury cannot be defeated by an allegation of an equitable cause of action which does not exist. *Reynolds v. Warner*..... 304
3. Depositor asserting preference to funds of insolvent state bank *held* not entitled to jury trial. *State, ex rel. Sorensen, v. State Bank of Bee*..... 442

Justices of the Peace.

An action to enforce an order of the state railway commission requiring repayment of an unlawful rate charged against a shipper may be brought in justice of the peace court. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co*..... 779

Landlord and Tenant.

1. A landlord who, in leasing a furnished apartment, warrants the safety of furniture and agrees to keep it in repair is liable to members of tenant's family for in-

juries resulting from landlord's negligent failure to keep furniture in repair. *Fried v. Buhrmann* 590
2. Statute providing that recording of lease containing agreement for a chattel mortgage on unplanted crops shall constitute notice *held* inapplicable to lease entered into before statute took effect. *Branz v. Hutchinson* 698

Libel and Slander.

An information charging publication of a libel in a newspaper which had "general circulation" in a particular county *held* to charge a misdemeanor, and not a felony. *Galloway v. State* 429

Liens.

Intention of parties to charge a particular fund with a lien must clearly appear to establish an equitable lien by agreement. *Glissmann v. McDonald* 693

Limitation of Actions.

1. Amended petition *held* not to state a new cause of action, subject to the defense of statute of limitations. *Kennedy v. Potts* 213
2. Where petition sets forth facts showing on its face that action is barred by limitation and alleging in avoidance thereof further facts positively denied by the answer, which also alleges that the action is barred by limitation, plaintiff must establish facts alleged in avoidance. *Baxter v. National Mtg. Loan Co.* 537
3. Plaintiff cannot amend petition stating cause of action barred by statute of limitations by substituting a different cause of action not so barred. *Thurston County v. Farley* 756
4. Action for recovery of fees withheld by clerk of district court is barred in four years, while action on his official bond is barred in ten years. *Thurston County v. Farley* 756

Lotteries.

1. "Lottery" defined. *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck* 13
2. Giving of coupons with purchase of merchandise, which coupons are good for drawing by chance of something of value, constitutes a lottery. *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck* 13

Mandamus.

Mandamus is proper remedy to compel board of directors of police pension fund of city of Omaha to issue order

to member of police force who has been legally retired on pension of one-half of his monthly salary at time of retirement. *State, ex rel. Rishling, v. Allen* 675

Master and Servant.

1. The owner of an automobile kept for family purposes *held* liable for injuries inflicted on a stranger as a result of his child's negligent driving. *Hogg v. MacDonald* 6
2. Statement of facts which must be proved to extend the family purpose doctrine in automobile law to an employer with whom employee makes his home. *Hogg v. MacDonald* 6
3. A stockyard platform at station of interstate carrier *held* part of "equipment" or "works" used for railway purposes, within the meaning of the federal employers' liability act. *Sullivan v. Chicago & N. W. R. Co* 92
4. An interstate carrier by rail must exercise reasonable care in the construction and maintenance of platforms at railway stations, but it is not under duty to maintain platforms that are absolutely safe for employees. *Sullivan v. Chicago & N. W. R. Co* 92
5. Under the federal statute, generally a carrier is not liable to an employee for damages arising from dangers that are obvious. *Sullivan v. Chicago & N. W. R. Co.* 92
6. Evidence in action for damages against carrier *held* insufficient to prove actionable negligence. *Sullivan v. Chicago & N. W. R. Co* 92
7. In action by railway employee for negligence, involving question of distance between passing tracks, *held* that negligence could not be predicated on distance between tracks. *Lenz v. Union P. R. Co* 99
8. A railway company is not negligent in failing to give to track workers warning of an approaching train, in absence of evidence of departure from customary practice. *Lenz v. Union P. R. Co* 99
9. An injured employee may bring an action in his own name against a third person liable for damages for personal injury, but employer paying compensation must be made a party. *Oliver v. Nelson* 160
10. In compensation cases, claimant must prove his case by a preponderance of evidence. *Hudson v. City of Lincoln* 202
11. Compensation cannot be based on possibilities or probabilities. *Hudson v. City of Lincoln* 202
12. Where evidence in a compensation case is conflicting, the supreme court, on trial *de novo*, may consider the fact that the trial court gave credence to some wit-

nesses rather than to others. *Hudson v. City of Lincoln* 202
13. Where an employee abandons his job, and while going to get his tools is killed, recovery cannot be had under the workmen's compensation law. *Hammond v. Keim*.... 310
14. If employee's private business creates necessity for a trip which would not have been undertaken otherwise, injury occurring on such trip is not compensable. *Hammond v. Keim*..... 310
15. Neither the county court nor the district court has original jurisdiction of workmen's compensation claims. *Zurich General Accident & Liability Ins. Co. v. Walker* 327
16. In compensation case, evidence *held* insufficient to sustain finding that employee's death was caused by accident incurred in course of employment. *Callahan v. Allied Mills* 352
17. Notice of intention to appeal from compensation award may be waived. *Callahan v. Allied Mills*..... 352
18. Where failure to file notice of intention to appeal from compensation award appears on face of petition, the defect is waived where objected to for first time in answer. *Callahan v. Allied Mills*..... 352
19. The compensation act will be liberally construed. *Hayes v. McMullen*..... 432
20. The compensation act is intended to protect employees injured in course of employment who could not recover under common-law rules, and to place the burden of such injuries on the particular industries involved, rather than on the public. *Hayes v. McMullen*..... 432
21. Snow blindness *held* compensable "accident," within compensation law. *Hayes v. McMullen*..... 432
22. Whether employee's departure from instructions defeats compensation depends on circumstances of particular case. *Volcheck v. Western Union Telegraph Co*..... 502
23. Disobedience of order as to manner of doing work does not operate to remove servant from sphere of his duties. *Volcheck v. Western Union Telegraph Co*..... 502
24. Employee's use of bicycle in delivering telegram, instead of complying with employer's directions to take a street car, *held* not a departure from scope of employment. *Volcheck v. Western Union Telegraph Co*..... 502
25. Evidence *held* insufficient to establish that cancer resulting in employee's death was caused by a fall in course of employment. *Amos v. Village of Bradshaw* 514
26. Only injuries arising out of and in course of employment are compensable. *McNaught v. Standard Oil Co.* 517

27. Injury to employee while engaged in a personal objective is not compensable. *McNaught v. Standard Oil Co.* 517
28. Generally, retention in employment of servant known to be habitually negligent renders master liable for injuries to third persons resulting from servant's negligent acts. *Triplett v. Western Public Service Co.* 835
29. Where employee engaged in constructing an electric transmission line across a pasture dropped lighted match or cigarette starting a prairie fire, employer *held* liable for resulting damage. *Triplett v. Western Public Service Co.* 835

Mortgages.

1. In suit to rescind purchase of mortgage, evidence *held* to sustain decree for defendant. *Eccles v. Durland Trust Co.* 42
2. Mere inadequacy of price will not preclude confirmation of foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Wolcott v. Wiles* 65
3. A decree for alimony payable monthly during the husband's lifetime is a lien on the husband's realty superior to a mortgage subsequently executed. *McCord v. McCord* 230
4. Mortgagee *held* entitled to relief from improvident bid. *Connecticut Mutual Life Ins. Co. v. Townsend* 256
5. A mortgagor is not entitled to continue in possession of land after foreclosure sale, but may reenter for the purpose of harvesting crops. *Jensen v. Gurley Grain Co.* 266
6. Agreement to pay mortgage debt *held* supported by a sufficient consideration. *Helfrich v. Baxter* 281
7. A grantee does not become personally liable for existing mortgage debt in absence of an agreement to pay the mortgage. *Helfrich v. Baxter* 281
8. Grantee's retention of amount of existing mortgage on property out of purchase price does not render him personally liable for mortgage debt. *Helfrich v. Baxter* 281
9. Recitations in deed that a mortgage is part of the consideration or purchase price do not create liability to pay the mortgage debt. *Helfrich v. Baxter* 281
10. Mortgagee is not entitled to a deficiency judgment against a purchaser of mortgaged premises, unless the proofs would enable him to maintain an action against purchaser for the mortgage debt. *Helfrich v. Baxter* 281
11. Deficiency judgments law *held* not applicable to pending suits. *Helfrich v. Baxter* 281

12. The word "defendant," as used in statute for nine months' stay of foreclosure sale, means mortgagor or one in privity with him. *Welty v. Schmutte* 415
13. Indorser who paid one of a series of notes secured by mortgage *held* entitled to subrogation to rights of prior parties, including benefit of "union" mortgage clause in fire policy covering mortgaged premises. *Weiner v. Aetna Ins. Co* 575
14. Where mortgagor applies for moratorium in mortgage foreclosure suit, the mortgagee, to avoid a stay, must show good cause why the application should not be granted. *Howarth v. Becker* 580
15. Refusal to set aside mortgage foreclosure sale *held* proper, under the facts. *First Trust Co. v. Brown* 668
16. Ordinarily, a receiver will not be appointed in a foreclosure suit when the mortgaged property is homestead of mortgagor. *First Trust Co. v. Bauer* 725
17. Appointment of receiver for apartment house on a lot contiguous to one on which mortgagor dwelt and which he claimed as a homestead *held* proper. *First Trust Co. v. Bauer* 725
18. Statute repealing prior statute permitting recovery of deficiency judgment *held* not applicable to pending actions. *Arnold v. Hawley* 766
19. A decree of foreclosure showing liability for deficiency precludes defendant, on application for deficiency judgment, from presenting any defense available prior to announcement of the decree. *Arnold v. Hawley* 766
20. Jurisdiction to render a deficiency judgment does not require notice other than the original summons. *Arnold v. Hawley* 766

Municipal Corporations.

1. A village treasurer is not authorized to deposit village funds in a bank not designated by the board of trustees as a depository. *Village of Overton v. Nagel* 264
2. The board of directors of municipal police pension fund cannot alter provisions of the home rule charter, nor adopt a valid by-law or rule in conflict with such charter. *State, ex rel. Rishling, v. Allen* 675
3. Policeman *held* entitled to pension based on salary at time of retirement. *State, ex rel. Rishling, v. Allen* 675
4. Courts will not inquire into motives actuating city council in enacting an ordinance. *State, ex rel. Rishling, v. Allen* 675
5. Officers and members of police department of Omaha may retire after attaining age of 50 years and having

served in the department for 20 years or more, and receive a pension of one-half their salary at time of retirement. *State, ex rel. Rishling, v. Allen* 675

Negligence.

1. To constitute actionable negligence, there must be duty or obligation which defendant is under to protect plaintiff from injury, failure to discharge that duty, and injury resulting therefrom. *McDonald v. Omaha & C. B. Street R. Co* 17
2. In action for negligence, if evidence clearly shows that plaintiff is guilty of more than slight negligence, which will defeat recovery, it is proper to sustain motion for instructed verdict for defendant. *McDonald v. Omaha & C. B. Street R. Co* 17
3. In action for negligence, an instruction that plaintiff must establish by greater weight of evidence that defendant's negligence caused the accident is sufficient relative to proximate cause, where there is no question of a remote or intervening cause. *Oliver v. Nelson* 160
4. Negligence is not actionable unless it is the proximate cause of injury. *Wagner v. Watson Bros. Transfer Co.* 535

Notice.

One is charged with knowledge of all facts where he is advised of facts sufficient to put an ordinarily prudent man on inquiry, which, if made, would lead to full knowledge of the facts. *Baxter v. National Mtg. Loan Co.* 537

Paupers.

In an emergency requiring an operation to save a pauper's life, the surgeon should, if reasonably possible, communicate with the proper county authorities, but, if the emergency be exigent, necessary services may be rendered, and the county will be liable for reasonable value thereof. *Burnham v. Lincoln County* 47

Pleading.

1. A general demurrer admits facts well pleaded, but does not admit conclusions of pleader. *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck* 13
2. A demurrer admits truth of facts well pleaded, but does not admit correctness of conclusions of law drawn therefrom by the pleader. *Thurston County v. Farley* 756
3. Reply *held* not to state new cause of action. *Masonic Bldg. Corporation v. Carlsen* 108

4. Where a misjoinder of causes of action is apparent on face of petition, failure to challenge such misjoinder by a proper pleading waives the defect. *Reynolds v. Warner* 304
5. Excluding evidence relating to issue not presented by pleadings *held* proper. *In re Estate of Alexander*..... 334
6. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Naeve v. Shea*..... 374
7. A pleading alleging facts constituting a cause of action or defense is sufficient. *Rhoads v. Columbia Fire Underwriters Agency* 710
8. That a certain theory was evidently contemplated by a pleader is of no avail as against theory shown by facts alleged. *Rhoads v. Columbia Fire Underwriters Agency* 710

Principal and Agent.

1. If principal authorizes agent to conduct transaction intending that agent shall make representations which principal knows to be untrue, or if, although principal does not intend that agent shall make misrepresentations, he knows that agent will do so, principal is liable therefor. *Ashby v. Peters*..... 338
2. When principal is informed of agent's act, he must give notice of dissent within a reasonable time or ratification will be presumed. *Baxter v. National Mtg. Loan Co.* 537
3. Where a borrower leaves proceeds of a loan to his credit with the lender and authorizes the borrower's agent to withdraw and disburse the proceeds, lender's responsibility ends with withdrawal of proceeds by agent. *Baxter v. National Mtg. Loan Co*..... 537
4. A principal cannot knowingly retain benefits of unauthorized act of his agent and escape the legal obligations. *General Credit Corporation v. Moore*..... 881
5. Principal accepting fruits of contract made by agent in excess of his authority is liable on the contract, if he had full knowledge or was put on inquiry from which he could have obtained full knowledge. *General Credit Corporation v. Moore*..... 881
6. Principal's ratification of agent's unauthorized act has the same effect as prior express authority, and generally relates back to time when unauthorized act was performed. *General Credit Corporation v. Moore*..... 881

Process.

Constructive service is sufficient in action *in rem*, but personal service or appearance is essential in action *in personam*. *In re Estate of Kierstead* 654

Railroads.

Where two persons of equal authority are riding in a motor vehicle which is driven on a railroad crossing in front of an approaching train in full view, it is immaterial, as regards liability, which of the parties was driving, since, if either party had looked and listened, he must have seen approaching train. *Behr v. Duling* 860

Replevin.

1. Substantial damages for detention of replevied property and for breach of warranty in sale of it are not recoverable where nominal damages only for such detention are proved; warrantor not being a party to the action and the evidence being insufficient to show liability of plaintiff on warranty. *Securities Investment Corporation v. Krejci* 763
2. Where property has been taken under writ of replevin and delivered to plaintiff and verdict is in favor of defendant, judgment must be in alternative for return of property or its value, or for value of defendant's possession, if it cannot be returned, and for damages for illegal detention; since statutory provision for alternative judgment is mandatory. *Securities Investment Corporation v. Krejci* 763

Sales.

In action to recover consideration paid for dairy business, evidence *held* to sustain judgment for plaintiff. *Vithen v. Jensen* 188

Schools and School Districts.

1. Provision of statute for payment out of state school fund of tuition of children whose parent is engaged in the service of the United States army, navy or marine corps, while stationed in Nebraska, *held* violative of constitutional provision requiring equitable distribution of school fund. *Taylor v. School District* 437
2. The fact that previous owners of realty under a mistake of fact as to district in which land was located paid their taxes to wrong school district *held* not to estop either landowners or school district in which land was located from claiming that it was in such district. *Plattsmouth Bridge Co. v. Turner* 738

3. Statute authorizing the county superintendent to change boundaries of any school district *held* inapplicable to boundaries of school district fixed by prior special statute, where it was intention of legislature that effect should be given both statutes. *Plattsmouth Bridge Co. v. Turner* 738

Specific Performance.

1. In a suit for specific performance of a contract to adopt a child, evidence *held* to sustain decree for defendants. *Nielson v. Kammerer* 57
2. Specific performance of an unrecorded contract to purchase realty, the price not having been paid, is not demandable as a matter of right. *Tate v. Krentz* 68
3. A parol contract is enforceable if one party has performed. *Petersen v. Hitchcock* 381
4. To establish specific performance of an oral contract to make a will leaving property to another, the proof must be clear, satisfactory, and unequivocal that the contract was made and substantially performed by the party seeking its enforcement. *Petersen v. Hitchcock* 381

Spendthrifts.

1. A spendthrift is not incapacitated either at common law or under statute apart from guardianship. *Taylor v. Koenigstein* 809
2. Bailee *held* to have fully and properly accounted for property of bailor, an alleged spendthrift not under guardianship. *Taylor v. Koenigstein* 809

Statute of Frauds.

Transaction whereby broker purchased bonds for company *held* not a "sale" by broker to company within statute of frauds. *Wachob, Bender & Co. v. Omaha Life Ins. Co.* 320

Statutes.

1. In construing statutes courts endeavor to ascertain and give effect to legislative intent. *McQuiston v. Griffith* 260
2. Statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision. *McQuiston v. Griffith* 260
3. Where a statute has been construed by administrative officials and the legislature has not amended it during subsequent sessions, such construction will not be disregarded by courts unless it is clearly erroneous. *McQuiston v. Griffith* 260

4. Where a state adopts a statute from another state, it also adopts the construction placed upon it by the courts of such state. *Stark v. Stark* 524
5. A special legislative act controls a later general enactment. *Plattsmouth Bridge Co. v. Turner* 738
6. A statute must not be broader than its title. *Joseph v. State* 824
7. Statute providing for imposition of penalty on one who does not know that his statements and representations are false, but by exercise of reasonable diligence could have known, or who had reasonable ground to believe that they were false, *held* invalid, as being broader than title. *Joseph v. State* 824

Street Railways.

1. Act of pedestrian who, after stopping in a place of safety, stepped directly in the path of a street car, *held* proximate cause of accident. *McDonald v. Omaha & C. B. Street R. Co* 17
2. Travelers have equal rights with street railway company to use of streets. *McDonald v. Omaha & C. B. Street R. Co* 17
3. A street car motorman must at all times have car under reasonable control, particularly when approaching street crossings. *McDonald v. Omaha & C. B. Street R. Co* 17

Subrogation. SEE MORTGAGES, 13

Surety subrogated to rights of municipality in deposit *held* not entitled to preference in assets of insolvent bank. *State, ex rel. Sorensen, v. South Omaha State Bank* 733

Telegraphs and Telephones. SEE COMMERCE. CONSTITUTIONAL LAW.

Trial. SEE APPEAL. CRIMINAL LAW.

1. In a law action, material issue of fact concerning which the evidence is conflicting should be submitted to the jury. *Jensen v. Omaha & C. B. Street R. Co* 21
2. Submission of special interrogatories is discretionary. *Masonic Bldg. Corporation v. Carlsen* 108
3. An instruction relating to pleadings which states their substance is sufficient. *Masonic Bldg. Corporation v. Carlsen* 108
4. Where an instruction correctly states the law, error cannot be predicated on selection of words. *Oliver v. Nelson* 160
5. A trial court should not direct the verdict unless the evidence is so clear on every issue that reasonable minds

could not come to any other conclusion. *Oswald v. Equitable Life Assurance Society* 173
6. Instructions must be construed together, and are sufficient if, when considered as a whole, they properly state the law. *Vithen v. Jensen* 188
7. Where the court has fully and properly instructed the jury on the issues, refusing requested instructions is not error. *In re Estate of Alexander* 334
8. Matters inhering in verdict of jury cannot be attacked by affidavits of the jurors. *In re Estate of Alton* 411
9. The court, in a case tried on a stipulation of facts and oral and written evidence, may consider all the evidence, though part thereof is inconsistent with the stipulation. *State, ex rel. Sorensen, v. Nebraska State Savings Bank* 479
10. Where both parties in action at law move for a peremptory instruction at close of evidence, the trial court may excuse the jury and determine the issues. *Andrews v. Commercial Casualty Ins. Co* 496
Greevy v. Massachusetts Mutual Life Ins. Co 586
11. Trial court, having instructed jury as to law applicable to issues and evidence, is not, in absence of request, required to elaborate on any other phase of the evidence. *Tidd v. Stull* 506
12. In action against driver of truck for injury resulting from driver's negligence, trial court's failure to define proximate cause *held* error, since proximate cause was a necessary issue to be submitted to the jury. *Wagner v. Watson Bros. Transfer Co* 535
13. The trial court, whether requested or not, should submit to the jury necessary issues of fact presented by pleadings and evidence, and failure to do so constitutes error. *Wagner v. Watson Bros. Transfer Co* 535
14. Evidence admitted without reservation limiting it to a particular purpose may be considered for any purpose for which it is relevant and competent. *Baxter v. National Mtg. Loan Co* 537
15. If evidence essential to recovery by plaintiff is clearly disproved by physical facts and conditions, a verdict should be directed against him. *Hessler v. Bellamy* 571
16. Instructions as to consideration of testimony *held* not prejudicial. *Moore v. Pacific Mutual Life Ins. Co* 605
17. When the trial court makes personal examination of topography of land and water involved in determining title to accretion land, his findings are entitled to great weight. *Independent Stock Farm v. Stevens* 619
18. A motion for a directed verdict need not be in writing,

but the grounds on which verdict is directed must be stated in the motion or in the direction of verdict. *Rhoads v. Columbia Fire Underwriters Agency* 710

19. Defendant's motion for a directed verdict must be treated as an admission of truth of all material and relevant evidence admitted favorable to plaintiff, and all proper inferences deducible therefrom. *Rhoads v. Columbia Fire Underwriters Agency* 710
20. The trial court is not justified in withdrawing case from jury if there is competent evidence from which alleged facts stating cause of action may be reasonably inferred. *Rhoads v. Columbia Fire Underwriters Agency* 710
21. Where evidence essential to recovery by plaintiff is clearly disproved by physical facts and conditions, the trial court should direct a verdict for defendant. *Behr v. Duling* 860
22. Incorporation, in instruction defining issues, of substance of pleadings which set forth such issues, *held* not error. *Scott v. New England Mutual Life Ins. Co.* 867

Trusts.

1. Where one obtains property by theft or fraud, equity raises a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge. *Federal Trust Co. v. Baxter* 1
2. Where a trustee mingles trust funds with his own, the whole mass may be resorted to by the beneficiary to restore the trust fund. *Federal Trust Co. v. Baxter* 1
3. Attorney acquiring, without consideration, title to client's land, *held* trustee. *Federal Trust Co. v. Baxter* 1
4. A recreant trustee, or those dealing with him with knowledge of the trust, cannot make profit out of trust property at expense of beneficial owner. *Federal Trust Co. v. Baxter* 1
5. Trustee's violation of duties placed on him by law is breach of trust. *Masonic Bldg. Corporation v. Carlsen* 108
6. All who knowingly participate or aid in committing a breach of trust are responsible for the wrong. *Masonic Bldg. Corporation v. Carlsen* 108
7. In construing trusts, the court must, if possible, ascertain the creator's intention. *Roats v. Roats* 194
8. Equity courts are reluctant to interfere with a trustee's discretion, but will intervene in beneficiary's behalf if trustee's denial of relief sought might be influenced by self-interest. *Roats v. Roats* 194

9. In suit to require trustee to reimburse beneficiary money paid in her own behalf, evidence *held* to sustain decree for plaintiff. *Roats v. Roats* 194
10. Cotrustees take as joint tenants rather than as tenants in common, and the whole trust vests in surviving trustees, unless the trust is purely a personal one, clearly intended to be executed only by the persons named. *Kennedy v. Potts* 213

Vendor and Purchaser.

Parties to an unrecorded contract for purchase of realty, the price not having been paid, may destroy the written instrument itself or abandon it by parol. *Tate v. Krentz* 68

Venue.

1. Action to recover damages for injury to realty may be brought only in county where realty is situated. *Triplett v. Western Public Service Co* 835
2. Action for damages caused by prairie fire *held* properly brought in county where realty was situated. *Triplett v. Western Public Service Co* 835

Waters.

1. "Accretion" is the process of gradually extending the shore line by deposits made by contiguous waters. *Independent Stock Farm v. Stevens* 619
2. The right of title and possession of land formed by accretion follows ownership of riparian lands to which it is attached. *Independent Stock Farm v. Stevens* 619
3. When land has been definitely formed by accretion and is permanent in character, the subsequent cutting of a channel through such accretion land by a small creek does not affect the ownership thereof. *Independent Stock Farm v. Stevens* 619
4. Landowners who organized a corporation to construct an irrigation canal *held* to have acquired a vested right to use of water to extent of their appropriation and application of it to irrigation of their lands. *Vonburg v. Farmers Irrigation District* 748
5. Landowners with vested rights in irrigation canal could sell same, reserving to themselves perpetual use of water right without being required to prorate water with subsequent patrons of canal company. *Vonburg v. Farmers Irrigation District* 748
6. Statutory provision for proration of irrigation water *held* not to require the owners of prior vested water right in time of water scarcity to prorate water with

users whose rights were subsequently obtained. *Vonburg v. Farmers Irrigation District* 748

Wills.

1. The surviving spouse's right to elect to take under deceased's will or under the law of descent is statutory, and the manner prescribed for exercising such right is a condition on which the right rests and must be substantially complied with. *Billiter v. Parriott* 238
2. Where a testamentary clause omits the beneficiary either by name or by reference, and the will nowhere discloses the identity of the intended beneficiary, extrinsic evidence cannot be received to determine that fact. *In re Estate of Wirsig* 297
3. A parent may disinherit a child by will. *In re Estate of Alexander* 334
4. The burden is on contestants to prove that a will resulted from undue influence. *In re Estate of Alton* 411
5. The county court, having found and decreed on hearing, pursuant to notice, that decedent died intestate, was not required to give notice for probate of a lost will. *In re Estate of Ladman* 483
6. Where a will left in custody of the testator cannot be found after his death, the presumption is that the testator destroyed it *animo revocandi*. *In re Estate of Ladman* 483
7. The presumption that testator destroyed will *animo revocandi* may be overcome by evidence, including declarations of testator. *In re Estate of Ladman* 483
8. Lands specifically devised are not liable for payment of annuities unless they are charged thereon by the will. *Luenenborg v. Luenenborg* 624
9. The testator's intention as manifested by the language of the will, and considered in connection with surrounding circumstances, governs its interpretation. *Luenenborg v. Luenenborg* 624
10. Devise of east half-section construed to be a devise of east half of quarter-section, in view of entire will. *Luenenborg v. Luenenborg* 624
11. A proceeding to determine whether an offered instrument should be admitted to probate as a will is an action *in rem*, and generally on appeal rights of the several legatees cannot be determined. *In re Estate of Kierstead* 654
12. Where jurisdiction to reduce a bequest appears wanting on face of record, the jurisdictional question may be raised collaterally. *In re Estate of Kierstead* 654

13. In a proceeding to determine whether an instrument should be admitted to probate as a will, jurisdiction of district court on appeal is limited ordinarily to such determination. *In re Estate of Kierstead* 654
14. Where, on appeal in a will contest, the parties agreed on a settlement and judgment was entered thereon, the judgment, in absence of ratification or approval, was binding only on those who signed the agreement. *In re Estate of Kierstead* 654

Witnesses.

1. A party so placed in litigation that he is called on to defend that which he obtained from a deceased person and to make defense which deceased might have made, if living, represents the deceased, within the statute regarding competency of witnesses. *Johnson v. Omaha Loan & Bldg. Ass'n* 37
Oft v. Ohrt 848
2. A physician is competent to testify to number of his professional visits. *Leeds v. Prudential Ins. Co* 395
3. The fact that a friend accompanying a patient remained with her during physician's examination is not a waiver of privilege by the patient and does not render the physician competent to testify. *Leeds v. Prudential Ins. Co* 395
4. Proper cross-examination of third person present during physician's examination of patient does not constitute waiver of privilege. *Leeds v. Prudential Ins. Co.* 395
5. A witness may be subjected to strict cross-examination, as test of accuracy of memory, understanding, integrity, biases, and means of judging. *Goldman v. State* 684
6. Foundation for impeachment of witness may be laid by cross-examination. *Goldman v. State* 684
7. The jury may disregard testimony of any witness who they believe from the evidence has wilfully testified falsely. *Joseph v. State* 824
8. Testimony of married woman regarding representations by deceased mortgagee inducing witness to mortgage her property for payment of her husband's debt *held* inadmissible. *Gibson v. Sheen* 728
9. In action by married woman to reform a deed, her husband has a direct legal interest in the result, so as to render him incompetent to testify. *Oft v. Ohrt* 848
10. In action by heir of deceased grantor to reform a deed, other heirs, not parties to the action, are competent witnesses. *Oft v. Ohrt* 848